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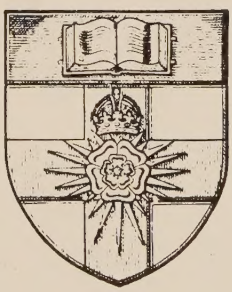

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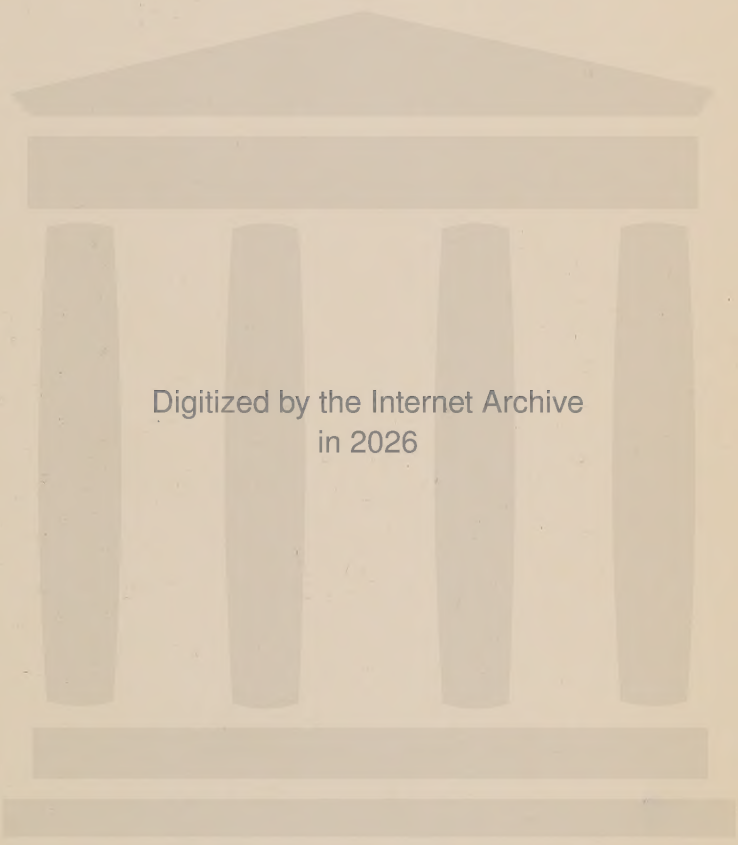

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LAW REPORTS.

Equity Cases,

INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. XVIII.

1874.—XXXVII & XXXVIII VICTORIÆ.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Ackroyd *v.* Ackroyd – – 313
Adamson's Case. *In re* Paraguassu Steam Tramway Company – – – – – 670
Appletreewick Lead Mining Company, *In re* – – – 95
Armstrong *v.* Armstrong – – 541
Ashworth, *Ex parte. In re* Hoare – – – – 705
Astley *v.* Earl of Essex – – 290
Atkinson *v.* Littlewood – – 595
Attorney-General *v.* Cockermouth Local Board – – 172
——— *v.* English – 608
Axmann *v.* Lund – – – 330
Aynsley *v.* Glover – – – 544

B.

Bailey *v.* Piper – – – 683
Barnard, Gravely *v.* – – 518
Barnett's Case. *In re* Essex Brewery Company – – 507
Bellairs *v.* Bellairs – – – 510
Best's Settlement Trusts, *In re* 686
Bigg, Mutlow *v.* – – – 246
Bird, Strong *v.* – – – 315
Bonelli's Electric Telegraph Company, *In re.* Cook's Claim – 655
——— (No. 2) 656
Boss, *Ex parte. In re* Whalley – 375
Brain, *In re* – – – – 389
Buck, Turner *v.* – – – 301
Budd, Tomlin *v.* – – – 368

C.

Clarke, De Serre *v.* – – – 587
Clergy Orphan Corporation, *In re* – – – – – 280
Cline's Estate, *In re* – – 213
Cloud, Youde *v.* – – – 634
Cockermouth Local Board, Attorney-General *v.* – – 172
Codrington's Charity, *In re* – 658
Comyn, Grove *v.* – – – 387
Cook's Claim. *In re* Bonelli's Electric Telegraph Company 655
——— (No. 2) 656
Cope *v.* Evans – – – 138
Crealock, Heath *v.* – – – 215
Credland *v.* Potter – – – 350
Crossley *v.* Maycock – – 180
Crowley's Claim. Lacy *v.* Hill 182
Cumberland, Scott *v.* – – 578

D.

PAGE

Daniell, Smith *v.* – – – 649
Dawson *v.* Small – – – 114
Delbridge, Richards *v.* – – 11
Denman, Neate *v.* – – – 127
Denton Colliery Company, *In re. Ex parte* Shaw – – – 16
De Serre *v.* Clarke – – – 587
Dowling *v.* Pontypool, Caerleon, and Newport Railway Company – – – – 714
Du Buisson, Shand *v.* – – 283
Duffield, Potter *v.* – – – 4
Dunne *v.* English – – – 524

E.

Ede, Paget *v.* – – – – 118
English, Attorney-General *v.* – 608
———, Dunne *v.* – – – 524
Essex Brewery Company, *In re.* Barnett's Case – – – 507
Essex (Earl of), Astley *v.* – – 290
Evans, Cope *v.* – – – 138
Evens, Payne *v.* – – – 356

F.

Felstead *v.* Gray – – – 92
Fiddey, Hoghton *v. In re* Hoghton – – – – – 573
Fisher *v.* Melles – – 268, n.
Freehold and General Investment Company, *In re.* Green's Case – – – – – 428

G.

Galitzin, Matthaei *v.* – – 340
Gilford, Pattisson *v.* – – 259
Glover, Aynsley *v.* – – – 544
Governors of Rugby School, Hayman *v.* – – – – 28
Gravely *v.* Barnard – – – 518
Gray, Felstead *v.* – – – 92
Green's Case. *In re* Freehold and General Investment Company – – – – 428
Gregory, Plumer *v.* – – – 621
Grove *v.* Comyn – – – 387

H.

PAGE

Harper, *Ex parte* – – – 539
Hartley's Case. *In re* Poole Firebrick and Blue Clay Company – – – – – 542
Hayman *v.* Governors of Rugby School – – – – 28
Heath *v.* Crealock – – – 215
Hedges' Trust Estate, *In re* – 419
Helliwell, Pearson *v.* – – 411
Hill, Lacey *v.* Crowley's Claim 182
—— *v.* South Staffordshire Railway Company – – – 154
Hirst, *Ex parte. In re* Hirst – 704
Hoare, *In re. Ex parte* Ashworth – – – – 705
Hogg *v.* Scott – – – 444
Hoghton, *In re.* Hoghton *v.* Fiddey – – – – 573
——— *v.* Fiddey. *In re* Hoghton – – – – 573
Honywood *v.* Honywood – – 306
Hooper *v.* Smart – – – 683
Hopkins' Trusts, *In re* – – 696
Howell, Thomas *v.* – – – 198

J.

Jameson, White *v.* – – – 303
Jervis *v.* Wolferstan – – 18
Jones *v.* Lloyd – – – 265
———, Paine *v.* – – – 320

K.

Kilpin, Wells *v.* – – – 298
Knight *v.* Knight – – – 487

L.

Lacey *v.* Hill. Crowley's Claim 182
Lambert, Sale *v.* – – – 1
Lawson, Tewart *v.* – – – 490
Leighton *v.* Leighton – – 458
Le Marchant *v.* Le Marchant – 414
Littler, *In re. Ex parte* Manchester and Liverpool District Banking Company – – 249
Littlewood, Atkinson *v.* – – 595
Lloyd, Jones *v.* – – – 265

	PAGE
London Financial Association *v.* Wrexham, Mold, and Connah's Quay Railway Company –	566
Lund, Axmann *v.* – – –	330

M.

Manchester and Liverpool District Banking Company, *Ex parte. In re* Littler – –	249
Matthaei *v.* Galitzin – –	340
Maud, Merchant Banking Company *v.* – – – –	659
Maycock, Crossley *v.* – –	180
Melles, Fisher *v.* – –	268, n.
Merchant Banking Company *v.* Maud – – – –	659
Merritt, Perry *v.* – – –	152
Moore & De La Torre's Case. *In re* Royal Victoria Palace Theatre Syndicate – –	661
Moore *v.* Moore – – –	474
Morrisy, *In re. Ex parte* Taylor	256
Mowlem, *In re* – – –	9
Mumford *v.* Stohwasser – –	556
Mutlow *v.* Bigg – – –	246

N.

National Society *v.* School Board of London – – – –	608
Neate *v.* Denman – – –	127
New Zealand Kapanga Gold Mining Company, *In re. Ex parte* Thomas – –	17, n.

O.

Old, Tickner *v.* – – –	422

P.

Paget *v.* Ede – – – –	118
Paine *v.* Jones – – –	320
Paraguassu Steam Tramway Company, *In re.* Adamson's Case – – – – –	670
Parke, *Ex parte. In re* Potter –	381
Pattisson *v.* Gilford – –	259
Payne *v.* Evens – – –	356
Pearson *v.* Helliwell – –	411
Perring *v.* Trail – – –	88
Perry *v.* Merritt – – –	152
Piper, Bailey *v.* – – –	683
Plumer *v.* Gregory – – –	621
Pollock *v.* Pollock – – –	329
Pontypool, Caerleon, and Newport Railway Company, Dowling *v.* – – – – –	714
Poole Firebrick and Blue Clay Company, *In re.* Hartley's Case – – – – –	542
Potter, Credland *v.* – – –	350
——— *v.* Duffield – – –	4
———, *In re. Ex parte* Parke –	381
Powell *v.* Rawle – – –	243
Preece, Steed *v.* – – –	192

R.

Rawle, Powell *v.* – – –	243
Richards *v.* Delbridge – –	11
Routledge, Warne *v.* – –	497
Row, Watson *v.* – – –	680
Royal Victoria Palace Theatre Syndicate, *In re.* Moore & De La Torre's Case – –	661

S.

Sale *v.* Lambert – – –	1
School Board of London, National Society *v.* – – –	608
Scott *v.* Cumberland – –	578
——, Hogg *v.* – – – –	444
Sewart's Estate, *In re* – –	278
Shand *v.* Du Buisson – –	283
Shaw, *Ex parte. In re* Denton Colliery Company – –	16
Small, Dawson *v.* – – –	114
Smart, Hooper *v.* – – –	683
Smith *v.* Daniell – – –	649
South Staffordshire Railway Company, Hill *v.* – –	154
Spurstowe's Charity, *In re* –	279
Steed *v.* Preece – – –	192
Stohwasser, Mumford *v.* – –	556
Strathmore Estates, *In re* –	338
Strong *v.* Bird – – –	315

T.

Taylor, *Ex parte. In re* Morrisy	256
Tewart *v.* Lawson – – –	490

	PAGE
Thomas *v.* Howell – – –	198
———, *Ex parte. In re* New Zealand Kapanga Gold Mining Company – – – –	17, n.
Tickner *v.* Old – – –	422
Tomlin *v.* Budd – – –	368
Trail, Perring *v.* – – –	88
Turner *v.* Buck – – –	301

V.

Viant's Settlement Trusts, *In re*	436

W.

Warne *v.* Routledge – –	497
Waters, *Ex parte. In re* Waters	701
Watson *v.* Row – – –	680
Wells *v.* Kilpin – – –	298
——— *v.* Wells – – –	504
Whalley, *In re. Ex parte* Boss –	375
White *v.* Jameson – – –	303
Williams, *Ex parte. In re* Williams – – – – –	373
Wolferstan, Jervis *v.* – –	18
Wrexham, Mold, and Connah's Quay Railway Company, London Financial Association *v.*	566

Y.

Youde *v.* Cloud – – –	634

TABLE OF CASES CITED.

A.

		PAGE
Abercorn's (Marquis of) Case	4 D. F. & J. 78	431
Ackroyd *v.* Smithson	1 Bro. C. C. 503	195, 580
Aiken *v.* Short	1 H. & N. 210; 25 L. J. (Ex.) 321	21
Alger *v.* Parrott	Law Rep. 3 Eq. 328	690
Alison's Case	Law Rep. 15 Eq. 394; Ibid. 9 Ch. 1	162
Allen *v.* Knight	5 Hare, 272	563
Alleyne *v.* Hussey	22 W. R. 209	441
Amis *v.* Witt	33 Beav. 619	477
Anderson *v.* Boynton	19 L. J. (Q.B.) 42	681
——— *v.* Read	22 W. R. 527	425
Annandale *v.* Pattison	9 B. & C. 919	164
Anon.	2 K. & J. 441	268
———	31 Beav. 310	641
Anstee *v.* Nelms	1 H. & N. 225	323
Antrobus *v.* Smith	12 Ves. 39	478
Archer *v.* Kelly	1 Dr. & Sm. 300	441
Arglasse (Lord) *v.* Mushamp	1 Vern. 75	121
Arundel's (Earl of) Case	Jenk. 6 Cent. Case 26, p. 243; 3 Dyer, 342 b.	512
Asher *v.* Whitlock	Law Rep. 1 Q. B. 1	323
Ashwell *v.* Staunton	30 Beav. 52	161
Atkinson *v.* Mackreth	Law Rep. 2 Eq. 570	626
Attorney-General *v.* Baxter	1 Vern. 248	204
——— *v.* Ely, Haddenham, and Sutton Railway Company	Law Rep. 4 Ch. 194	743
——— *v.* Gee	Law Rep. 10 Eq. 131	177
——— *v.* Hughes	2 Vern. 105	204
——— *v.* Leeds Corporation	Law Rep. 5 Ch. 583	176
——— *v.* Lloyd	1 Ves. Sen. 32	210
——— *v.* Magdalen College	10 Beav. 402	55
——— *v.* Mayor of Kingston	34 L. J. (Ch.) 481	175
——— *v.* Mid-Kent Railway Company	Law Rep. 3 Ch. 100	746
——— *v.* Nichol	16 Ves. 338	552
——— *v.* Oxford, Worcester, and Wolverhampton Railway Company	2 W. R. 330	176
——— *v.* Price	17 Ves. 371	205
——— *v.* Ray	Law Rep. 9 Ch. 403, n.	449
——— *v.* Wilkins	17 Beav. 285	228
Aubrey's Estate, Re	17 Jur. 874	339
Austin's Case	Law Rep. 2 Eq. 435	432

B.

		PAGE
Back *v.* Stacey	2 Car. & P. 466	552
Bacon *v.* Proctor	T. & R. 31	493
Baglan Hall Colliery Company, In re	Law Rep. 5 Ch. 346	105
Bagot *v.* Bagot	32 Beav. 509	308
—— *v.* Legge	2 Dr. & Sm. 259	580
Bailey *v.* Birchall	2 H. & M. 371	681
—— *v.* Wright	18 Ves. 49	690
Baily *v.* Taylor	1 Russ. & My. 73	452
Baker *v.* Hall	12 Ves. 497	488
Balsh *v.* Hyham	2 P. Wms. 453	20
Banque de Crédit Commercial *v.* De Gas	Law Rep. 6 C. P. 142	286
Barnes *v.* Wood	Law Rep. 8 Eq. 424	684
Bartlett *v.* Gillard	3 Russ. 149	601
Barton's Trust, In re	Law Rep. 5 Eq. 238	700
Bateman *v.* Hotchkin	10 Beav. 426	493
—— *v.* ——	31 Beav. 486	308
Bates *v.* Mackinley	31 Beav. 280	698
Baugh *v.* Read	1 Ves. 257	464
Beardmer *v.* London and North Western Railway Company	1 Mac & G. 112	726
Beak *v.* Beak	Law Rep. 13 Eq. 489	478
Beall *v.* Smith	Law Rep. 9 Ch. 85	270
Beauchamp (Lord) *v.* Great Western Railway Company	Law Rep. 3 Ch. 745	742
Beaufort (Duke of) *v.* Patrick	17 Beav. 60	734
Beckett *v.* Buckley	Law Rep. 17 Eq. 435	299
Belhaven's (Lord) Case	3 D. J. & S. 41	543
Bell *v.* Coleman	5 Madd. 22	465
—— *v.* Hull and Selby Railway Company	1 Railw. Cas. 616	746
Beloved Wilkes Charity, Re	3 Mac. & G. 440	57
Bengough *v.* Walker	15 Ves. 507	602
Bennett *v.* Wyndham	23 Beav. 521	494
Berney *v.* Sewell	1 Jac. & W. 647	299
Binns *v.* Parr	7 Hare, 288	539
Blair *v.* Bromley	2 Ph. 354	632
Blake *v.* Blake	18 W. R. 944	343
Blann *v.* Bell	2 D. M. & G. 775	425
Blower's Trusts, In re	Law Rep. 6 Ch. 351	505
Blythe *v.* Granville	13 Sim. 190	441
Blyth's Trusts, In re	Law Rep. 16 Eq. 468	278
Board *v.* Board	Law Rep. 9 Q. B. 48	323
Boughton *v.* Boughton	1 H. L. C. 406	517
Bourdillon *v.* Roche	27 L. J. (Ch.) 681	628
Boutts *v.* Ellis	4 D. M. & G. 249	477
Bowen *v.* Evans	1 J. & Lat. 178	228
Bowyer *v.* Woodman	Law Rep. 3 Eq. 313	247
Braham *v.* Bustard	1 H. & M. 447	141
Brewster *v.* Sewell	3 B. & A. 296	231
Briggs *v.* Upton	Law Rep. 7 Ch. 376	690
Brisbane *v.* Dacres	5 Taunt. 143	675
Brookman's Trust, In re	Law Rep. 5 Ch. 182	22
Brotherhood's Case	4 D. F. & J. 566	432
Brown *v.* Gellatly	Law Rep. 2 Ch. 751	424
Browne *v.* Collins	Law Rep. 12 Eq. 586	698
—— *v.* Groombridge	4 Madd. 495	580
Browne's Will, In re	Law Rep. 7 Eq. 231	441
Browning, Ex parte	Law Rep. 9 Ch. 583	709

		PAGE
Brown's Case	Law Rep. 9 Ch. 102	431
Brunsden *v.* Woolredge	Amb. 507	205
Bryan *v.* Wagstaff	Ry. & Mood. 327	231
Buck *v.* Shippam	1 Ph. 694	252
Bullen *v.* Denning	5 B. & C. 842	308
Bunbury *v.* Bunbury	2 Beav. 173	653
Burgess *v.* Burgess	3 D. M. & G. 896	141
——— *v.* Robinson	3 Mer. 7	245
Burn *v.* Carvalho	4 My. & Cr. 690	287
Burnett, Ex parte	2 M. D. & D. 357	376
Burnham National Schools, In re	Law Rep. 17 Eq. 241	617
Burrowes *v.* Gore	6 H. L. C. 907	248
Burt *v.* Sturt	10 Hare, 415	579
Bush's Case	Law Rep. 9 Ch. 554	675

C.

Caffery *v.* Darby	6 Ves. 488	640
Calton *v.* Bragg	15 East, 223	166
Calvert *v.* Godfrey	6 Beav. 97	194
Campbell *v.* French	3 Ves. 321	210
Canham *v.* Jones	2 V. & B. 218	141
Capron *v.* Capron	Law Rep. 17 Eq. 288	214, 329
Carew's Case	7 D. M. & G. 43	664
Carnochan *v.* Norwich and Spalding Railway Company	26 Beav. 169	734
Cartaret *v.* Petty	2 Swans. 323, n.; 2 Ch. Ca. 214	123
Carter *v.* Carter	3 K. & J. 617	230, 559
Cary *v.* Kearsley	4 Esp. 168	457
Castle *v.* Wilkinson	Law Rep. 5 Ch. 534	684
Cates *v.* Winter	3 T. R. 306	231
Catts' Trusts, Re	2 H. & M. 46; 33 L. J. (Ch.) 495	296
Chadwick *v.* Turner	Law Rep. 1 Ch. 310	353
Chambers *v.* Crichley	33 Beav. 374	335
Chancey's Case	1 P. Wms. 408	598
Chapman *v.* Brown	6 Ves. 404	116
Chapman's Case	Law Rep. 2 Eq. 567	432
Charlton *v.* Earl of Durham	Law Rep. 4 Ch. 433	226
Chesman *v.* Nainby	1 Bro. P. C. 234, Toml. Ed.	521
Chester *v.* Chester	Law Rep. 12 Eq. 444	90
Chichester *v.* Coventry	Law Rep. 2 H. L. 71	597
Chicot *v.* Lequesne	2 Ves. Sen. 315	58
Chinnock *v.* Marchioness of Ely	4 D. J. & S. 638	181
Chippendale, Ex parte	4 D. M. & G. 19	20
Clark *v.* Bell	Morison's Dictionary of Decisions, vol. xix. p. 9	449
Clarkson *v.* Edge	33 Beav. 227	520
Claxton, Ex parte	Law Rep. 7 Ch. 532	376
Cleland's Case	Law Rep. 14 Eq. 387	102
Clement *v.* Maddick	1 Giff. 98	141
Cline's Estate, In re	Law Rep. 18 Eq. 213	329
Clinton's Trust, In re	Law Rep. 13 Eq. 295	441
Coates' Case	Law Rep. 17 Eq. 169	105
Coats *v.* Clarence Railway Company	1 Russ. & My. 181	734
Cobb, Ex parte	Law Rep. 8 Ch. 727	257
Cole *v.* Willard	25 Beav. 568	600
Collins Company *v.* Brown	3 K. & J. 423	141

		PAGE
Colquhoun, Re	1 Sm. & Giff. App. 1; 5 D. M. & G. 35	681
Colyer *v.* Finch	5 H. L. C. 905	228
Cooke *v.* Dealey	22 Beav. 196	195
Cookney *v.* Anderson	31 Beav. 452; 1 D. J. & S. 365	343
Coomer *v.* Bromley	5 De G. & Sm. 532	628
Coppard *v.* Allen	2 D. J. & S. 173	627
Corbet's Case	1 Rep. 83 b.	296
Cosnahan *v.* Grice	15 Moo. P. C. 215	478
Cossey *v.* London, Brighton, and South Coast Railway Company	Law Rep. 5 C. P. 146	652
Cowley (Earl) *v.* Wellesley	Law Rep. 1 Eq. 656	307
Cowper *v.* Fletcher	6 B. & S. 464	383
Cox *v.* Cox	3 K. & J. 554	194
—— *v.* ——	Law Rep. 8 Eq. 343	314
Cramp *v.* Playfoot	4 K. & J. 479	116
Cranstown (Lord) *v.* Johnston	3 Ves. 170	121
Crawford's Trusts, In re	2 Drew. 230	689
Crockett *v.* Crockett	2 Ph. 553; 1 Hare, 451	415
Croft *v.* Day	7 Beav. 84	140
Cross *v.* Sprigg	6 Hare, 552	316
Crossley *v.* Dixon	10 H. L. C. 293	335
Cullingworth *v.* Lloyd	2 Beav. 385	252
Cunningham *v.* Wegg	2 Bro. C. C. 240	132
Curnick *v.* Tucker	Law Rep. 17 Eq. 320	415
Curriers' Company *v.* Corbett	2 Dr. & Sm. 355	553
Currie's Case	3 D. J. & S. 367	431

D.

Daugars *v.* Rivaz	28 Beav. 233	55
Davey *v.* Wietlisbach	Law Rep. 15 Eq. 269	388
Davies *v.* Nicolson	2 De G. & J. 693	22
—— *v.* Topp	1 Bro. C. C. 524	583
Davis *v.* Angel	21 Beav. 223	245
—— *v.* Holding	1 M. & W. 159	377
—— *v.* Mason	5 T. R. 118	521
—— *v.* Turvey	32 Beav. 554	195
Dawson *v.* Dawson	Law Rep. 4 Eq. 504	598
Dean *v.* Bennett	Law Rep. 6 Ch. 489	49
Debeze *v.* Mann	2 Bro. C. C. 165	464
Deere *v.* Guest	1 My. & Cr. 516	733
Denton Colliery Company, In re	Law Rep. 18 Eq. 16	543
Devaynes *v.* Robinson	24 Beav. 86	640
Dickenson *v.* Teasdale	1 D. J. & S. 52	248
Dillon *v.* Coppin	4 My. & Cr. 647	478
Dimes *v.* Scott	4 Russ. 195	425
Dimond, Ex parte	Law Rep. 5 Ch. 743	710
Disderi & Co., In re	Law Rep. 11 Eq. 242	431
Dobson, In the Goods of	Law Rep. 1 P. & D. 88	210
Doe *v.* Beauclerk	11 East, 657	296
—— *v.* Bristol and Exeter Railway Company	6 M. & W. 320	727
—— *v.* Haddon	3 Doug. 310	50
—— *v.* North Staffordshire Railway Company	16 Q. B. 526	727

		PAGE
Douthat, Ex parte	4 B. & A. 67	376
Drummond *v.* Drummond	Law Rep. 2 Ch. 32	655
Dummer *v.* Corporation of Chippenham	14 Ves. 245	46
Duncan *v.* Hill	Law Rep. 8 Ex. 242	188
Dundonald (Earl of) *v.* Masterman	Law Rep. 7 Eq. 504	626
Durham (Earl of) *v.* Wharton	3 Cl. & F. 156	472
Dyer *v.* Dyer	34 Beav. 504	195

E.

Eastwood *v.* Vinks	2 P. Wms. 613	599
Edelsten *v.* Edelsten	1 D. J. & S. 185	140
Edmunds *v.* Low	3 K. & J. 318	597
Edwards, In re	Law Rep. 9 Ch. 97	441
——— *v.* Coombe	Law Rep. 7 C. P. 519	252
——— *v.* Hall	6 D. M. & G. 74	203
——— *v.* Jones	1 My. & Cr. 226	478
Elborne *v.* Goode	14 Sim. 165	580
Emperor of Austria *v.* Day	3 D. F. & J. 217	263
England, In re	Law Rep. 12 Eq. 207	257
Evans *v.* Bicknell	6 Ves. 174	226
—— *v.* Rosser	2 H. & M. 190	511
Eyre *v.* Burmester	10 H. L. C. 90	229
—— *v.* Marsden	4 My. & Cr. 231	579

F.

Fanshaw, In re	Law Rep. 11 Eq. 615	383
Farnham *v.* Phillips	2 Atk. 215	465
Farquharson *v.* Cave	2 Coll. 356	484
Fawcett *v.* Whitehouse	1 Russ. & My. 132	535
Ferrao's Case	Law Rep. 9 Ch. 355	674
Fisher *v.* Melles	Law Rep. 18 Eq. 268, n.	268, 543
Fisk *v.* Attorney-General	Law Rep. 4 Eq. 521	116
Flanagan *v.* Flanagan	Cited 1 Bro. C. C. 498	195
Flemon's Trusts, In re	Law Rep. 10 Eq. 612	278
Flower *v.* Marten	2 My. & Cr. 459	316
Ford *v.* Beech	11 Q. B. 852	252
—— *v.* Forster	Law Rep. 7 Ch. 611	140
Forth *v.* Chapman	1 P. Wms. 663	513
Foster *v.* Smith	1 Ph. 629	412
—— *v.* Weston	6 Bing. 709	168
Fothergill's Case	Law Rep. 8 Ch. 270	103
Fowle *v.* Freeman	9 Ves. 351	181
Fowler *v.* Fowler	33 Beav. 616	116
——— *v.* ———	3 P. Wms. 353	598
Fowler's Case	Law Rep. 14 Eq. 316	431
Fox *v.* Scard	33 Beav. 327	520
France *v.* France	Law Rep. 13 Eq. 173	388
Fraser *v.* Thompson	1 Giff. 337	681
—— *v.* Jones	17 L. J. (Ch.) 353	228
Fremington School, Re	11 Jur. 421; 10 Jur. 512	58
French *v.* Macale	2 D. & War. 269	520
Frowd's Settlement, In re	4 N. R. 54	591
Fry *v.* Fry	27 Beav. 144	641
Fryer *v.* Bernard	2 P. Wms. 261	121

G.

		PAGE
Galton *v.* Hancock	2 Atk. 430	381
Gardner *v.* Parker	3 Madd. 184	477
General Company for Promotion of Land Credit, In re	Law Rep. 5 Ch. 363; Ibid. 5 H. L. 176	346
Genery *v.* Fitzgerald	Jac. 468	512
Gerrard *v.* O'Reilly	3 D. & War. 414	455
Giacometti *v.* Prodgers	Law Rep. 8 Ch. 338	489
Gibbins *v.* Board of Management of Metropolitan Asylum District	11 Beav. 1	181
Gibson *v.* Overbury	7 M. & W. 555	229
Gilbert *v.* Lewis	1 D. J. & S. 38	45
Gillam *v.* Taylor	Law Rep. 16 Eq. 581	206
Goodale *v.* Gawthorne	2 Sm. & Giff. 375	10
Goodson *v.* Richardson	Law Rep. 9 Ch. 221	733
Gordon *v.* Gordon	1 Mer. 141	210
Gorrissen's Case	Law Rep. 8 Ch. 507	664
Gough *v.* Bult	16 Sim. 323	248
Grace *v.* Webb	15 Sim. 384	513
Grafftey *v.* Humpage	1 Beav. 46; 3 Jur. 622	441
Grant *v.* Grant	34 Beav. 623	476
—— *v.* ——	Law Rep. 5 C. P. 380, 727; Ibid. 1 P. & D. 654	505
Grave *v.* Earl of Salisbury	1 Bro. C. C. 425	465
Gray *v.* Lewis	Law Rep. 8 Eq. 526	627
—— *v.* Liverpool and Bury Railway Company	9 Beav. 391	725
Grayburn *v.* Clarkson	Law Rep. 3 Ch. 605	22, 640
Greenhough *v.* Gaskell	1 My. & K. 98	651
Grenville-Murray *v.* Earl of Clarendon	Law Rep. 9 Eq. 11	45

H.

Haines *v.* Taylor	2 Ph. 209	263
Halfhide *v.* Robinson	Law Rep. 9 Ch. 373	270
Ham's Trust, In re	2 Sim. (N.S.) 106	586
Harman *v.* Johnson	2 E. & B. 61	628
Harmer *v.* Harris	1 Russ. 155	681
Hartopp *v.* Hartopp	17 Ves. 184	470
Hart's Trusts, Re	3 De G. & J. 195	515
Harvey *v.* Aston	1 Atk. 361	512
Harward's Case	Law Rep. 13 Eq. 30	431
Hatton, In re	Law Rep. 7 Ch. 723	252
—— *v.* Haywood	Law Rep. 9 Ch. 229	299
Hawksbee *v.* Hawksbee	11 Hare, 230	323
Head *v.* Egerton	3 P. Wms. 280	227
Heath *v.* Bucknall	Law Rep. 8 Eq. 1	545
—— *v.* Lewis	3 D. M. & G. 954	511
Henderson *v.* Cross	29 Beav. 216	154
—— *v.* Lacon	Law Rep. 5 Eq. 249	664
Hendrick *v.* Wood	9 W. R. 588	346
Herbert *v.* Sayer	5 Q. B. 965	257
Hewitt *v.* Kaye	Law Rep. 6 Eq. 198	478
Hichens *v.* Congreve	1 Russ. & My. 150, n.	535
Higden *v.* Williamson	3 P. Wms. 132	591
Higgins *v.* Sargent	2 B. & C. 348	166

		PAGE
Hill v. Barclay	18 Ves. 56	401
Hinves v. Hinves	3 Hare, 609	424
Hirst v. Denham	Law Rep. 14 Eq. 542	140
Hitchcock v. Coker	6 A. & E. 438	520
Hoare v. Osborne	Law Rep. 1 Eq. 585	116
Hodges' Legacy, In re	Law Rep. 16 Eq. 92	296
Hodges v. Waldington	2 Vern. 360	21
Holmes v. Holmes	1 Bro. C. C. 555	465
Homer v. Ashford	3 Bing. 322	521
Hood v. Lord Barrington	Law Rep. 6 Eq. 218	3, 6
Hosson, Ex parte	Law Rep. 8 Ch. 231	702
Howard v. Woodward	34 L. J. (Ch.) 47	520
Howe v. Earl of Dartmouth	7 Ves. 137	425
Howitt v. Hall	10 W. R. 331	499
Hubbard v. Hubbard	2 H. & M. 33	195
Hunt v. Rhoes	2 D. F. & J. 578	228
Hunter v. Bullock	Law Rep. 14 Eq. 45	116
——— v. Walters	Law Rep. 7 Ch. 75	290
Husband v. Davis	10 C. B. 645	220
Husbands v. Husbands	1 Vern. 95	465

I.

Ibbotson v. Elam	Law Rep. 1 Eq. 188	698
Imperial Land Credit Company, Re	16 W. R. 1191	432
——— Mercantile Credit Association v. Coleman	Law Rep. 6 H. L. 189	535, 540
Ingle v. Richards	28 Beav. 366	317
Isaac v. Defriez	17 Ves. 373, n.	295

J.

Jackson v. Duke of Newcastle	3 D. J. & S. 275	546
——— v. Petrie	10 Ves. 164	121
Jacob v. Kirk	2 Moo. & Rob. 221	2
Jacobs, Ex parte	Law Rep. 17 Eq. 575	708
James v. Rey	Law Rep. 17 Eq. 562	368
——— v. Smith	14 Sim. 214	505
Jarrold v. Houlston	3 K. & J. 708	452
Jay, Ex parte	Law Rep. 9 Ch. 133	257, 277, 708
Jeffery, Ex parte	Law Rep. 9 Ch. 144	257
Jeffryes v. Agra and Masterman's Bank	Law Rep. 2 Eq. 674	162
Jenny v. Preston	13 Sim. 356	195
Johnson v. Wyatt	2 D. J. & S. 18	453
Jones v. Evans	12 Jur. 664	685
——— v. Jones	4 K. & J. 361	122
——— Lock	Law Rep. 1 Ch. 25	473
——— v. May	2 My. & K. 125	293
——— v. Ogle	Law Rep. 8 Ch. 192	214, 698
——— v. Smith	1 Hare, 43	354
——— v. Williams	24 Beav. 47	355
Joyce v. De Moleyns	2 J. & Lat. 374	228

K.

		PAGE
Keating *v.* Sparrow	1 Ball. & B. 367	400
Kekewich *v.* Manning	1 D. M. & G. 176	12
Kelly *v.* Morris	Law Rep. 1 Eq. 697	457
Kempe *v.* Cory	2 Vent. 227	383
Kildare (Earl of) *v.* Eustace	1 Vern. 419	123
Kinahan *v.* Bolton	15 Ir. Ch. Rep. 75	140
Kincaid's Case	Law Rep. 11 Eq. 192	431
Kingston's (Duchess of) Case	2 Sm. L. C. 6th Ed. 679	664

L.

Lafone *v.* Falkland Islands Company	4 K. & J. 34	653
Lamb *v.* North London Railway Company	Law Rep. 4 Ch. 522	746
Lambe *v.* Eames	Law Rep. 6 Ch. 597; Ibid. 10 Eq. 267	415
Laugher *v.* Pointer	5 B. & C. 547	305
Lawrence *v.* Campbell	4 Drew. 485	653
Lawson *v.* Lawson	1 P. Wms. 441	477
Leather Cloth Company *v.* American Leather Cloth Company	11 H. L. C. 523	140
Lee *v.* Olding	25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850	590
Leech *v.* Schweder	Law Rep. 9 Ch. 466	261
Leeds (Duke of) *v.* Earl of Amherst	2 Ph. 117	455
Leeke's Case	Law Rep. 11 Eq. 100; Ibid. 6 Ch. 469	431
Lewis *v.* Chapman	3 Beav. 133	452
—— *v.* Fullarton	2 Beav. 6	453
Light *v.* Light	25 Beav. 248	270
Liley *v.* Hey	1 Hare, 580	206
Limbrey *v.* Gurr	6 Madd. 151	116
Linguen *v.* Souray	Prec. Ch. 400	601
Llewellyn's Trusts, Re	29 Beav. 171	425
Lloyd *v.* Lloyd	2 Sim. (N.S.) 255	512
Logan *v.* Wienholt	1 Cl. & F. 611	521
Lomax, In re	34 Beav. 294	278
London (Mayor of) *v.* Cox	Law Rep. 2 H. L. 239	286, 345
Lord *v.* Godfrey	4 Madd. 455	425
Lowther *v.* Lowther	13 Ves. 95	534
Lumley *v.* Wagner	1 D. M. & G. 604	499
Luttrell's Case	4 Rep. 86 a., 87 a.	549

M.

M'Andrew *v.* Bassett	33 L. J. (Ch.) 561	140
Macfarlane *v.* Rolt	Law Rep. 14 Eq. 580	652
McIntosh *v.* Great Western Railway Company	4 Giff. 683	164
Maclaren *v.* Stainton	27 Beav. 460	698
Maddison *v.* Pye	32 Beav. 658	579
Maher *v.* Foundling Hospital	1 V. & B. 188	455
Mahon *v.* Savage	1 Sch. & Lef. 111	207
Maitland v. Bateman	18 L. J. (Ch.) 273	641
Mallalieu *v.* Hodgson	16 Q. B. 689	58

		PAGE
Manning *v.* Spooner	3 Ves. 114	583
Marlborough (Duchess of) *v.* Strong	4 Bro. P.C. 539; 14 Vin. Ab. 458	166
——— (Duke of) *v.* Lord Godolphin	2 Ves. Sen. 61	591
Marples *v.* Bainbridge	1 Madd. 590	512
Marriot *v.* Hampton	2 Sm. L. C. 4th Ed. p. 325	675
Marshall *v.* Holloway	2 Sw. 432	495
Martin, In the Goods of	Law Rep. 1 P. & D. 380	210
——— *v.* Goble	1 Camp. 320	551
Maugham, In re	22 W. R. 748	656
Maunder *v.* Lloyd	2 J. & H. 718	121, 346
Maw *v.* Topham	19 Beav. 576	684
Maxfield *v.* Burton	Law Rep. 17 Eq. 15	559
May *v.* Biggenden	24 Beav. 207	166
Mellersh *v.* Keen	27 Beav. 236	268
Michell *v.* Michell	4 Beav. 549	541
Mildmay *v.* Methuen	3 Drew. 91	166
Miller *v.* Miller	3 P. Wms. 356	478
Millington *v.* Fox	3 My. & Cr. 338	141
Milroy *v.* Lord	4 D. F. & J. 264	12, 478
Minet *v.* Morgan	Law Rep. 8 Ch. 361	651
Mitchel *v.* Reynolds	1 P. Wms. 181	320
Moggridge *v.* Thackwell	7 Ves. 36	206
Molony *v.* Kernan	2 D. & War. 31	534
Moore *v.* Culverhouse	27 Beav. 639	353
——— *v.* Darton	4 De G. & Sm. 517	479
Morgan *v.* Malleson	Law Rep. 10 Eq. 475	13, 476
Morley *v.* Rennoldson	2 Hare, 570	513
Morris *v.* Wright	Law Rep. 5 Ch. 279	457
Mortlock *v.* Buller	10 Ves. 392	684
Morton *v.* Woods	Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293	383
Munday *v.* Knight	3 Hare, 497	45
Murphy *v.* O'Shea	2 J. & Lat. 422	534

N.

Nash *v.* Morley	5 Beav. 177	204
Neate *v.* Duke of Marlborough	3 My. & Cr. 407	299
Nethersole *v.* School for the Indigent Blind	Law Rep. 11 Eq. 1	90
Neve *v.* Pennell	2 H. & M. 170	353
Newcastle (Duke of) In re	Law Rep. 8 Eq. 700	299
Newington *v.* Levy	Law Rep. 5 C. P. 607	252
Newton *v.* Newton	Law Rep. 4 Ch. 143	226
New Zealand Kapanga Gold Mining Company, In re	Law Rep. 18 Eq. 17, n.	543
Norris *v.* Chambers	29 Beav. 246; 3 D. F. & J. 583	122, 343
North British Railway Company *v.* Tod	2 Cl. & F. 722	726

O.

Oddie *v.* Brown	4 De G. & J. 179	579
Orde, Ex parte	Law Rep. 6 Ch. 881	702

		PAGE
Ormond *v.* Kymersley	7 L. J. (Ch.) 150	311
Osborn *v.* Morgan	9 Hare, 432	490
Otter *v.* Melvill	2 De G. & Sm. 257	441
Oxenden *v.* Lord Compton	2 Ves. 69	196

P.

Palmer *v.* Simmonds	2 Drew. 221	417
Paris *v.* Paris	10 Ves. 185	698
Parker *v.* Lewis	Law Rep. 8 Ch. 1035	188
——— *v.* Morrell	2 Ph. 453	660
——— *v.* Watkins	Joh. 133	541
Partington *v.* Reynolds	4 Jur. (N.S.) 200; 6 W. R. 615	575
Paterson *v.* Murphy	11 Hare, 88	478
Pattison *v.* Hawksworth	10 Beav. 375	361
Pawlett *v.* Pawlett	1 Vern. 204, 321	512
Pawsey *v.* Barnes	20 L. J. (Ch.) 393	247
Peace *v.* Hains	11 Hare, 151	316
Peachy *v.* Duke of Somerset	1 Str. 447	400
Peacock *v.* Peacock	13 W. R. 516	586
Pearson *v.* Pearson	1 Sch. & Lef. 10	301
Pedder's Settlement Trusts, In re	Law Rep. 10 Eq. 585	440
Penfold *v.* Mould	Law Rep. 4 Eq. 562	478
Penn *v.* Lord Baltimore	1 Ves. Sen. 444; Tu. L. C. vol. ii. 3rd Ed. 853	121
Phené *v.* Gillan	5 Hare, 1	20
Phillips *v.* Gutteridge	3 D. J. & S. 332	412
Picard *v.* Sears	6 A. & E. 469	664
Pidgeley *v.* Rawling	2 Coll. 275	308
Pike *v.* Hoare	2 Eden, 182	123
Pilcher *v.* Rawlins	Law Rep. 7 Ch. 259	229, 559
Pinhorn *v.* Souster	8 Ex. 763	384
Plumbe *v.* Neild	6 Jur. (N.S.) 529	699
Portarlington (Lord) *v.* Soulby	3 My. & K. 104	124
Porter *v.* Fry	1 Vent. 199	296
Potteries, Shrewsbury, and North Wales Railway Company *v.* Minor	Law Rep. 6 Ch. 621	570
Powell *v.* Trotter	1 Dr. & Sm. 388	354
Preston *v.* Melville	16 Sim. 163	698
Price *v.* Anderson	15 Sim. 473	698
Prior *v.* Horniblow	2 Y. & C. Ex. 200	247
Pritchard's Case	Law Rep. 8 Ch. 956	102
Prowse *v.* Spurgin	Law Rep. 5 Eq. 99	21
Pullen *v.* Palmer	3 Salk. 206	384
Pye, Ex parte	18 Ves. 140	12, 465
Pym *v.* Lockyer	5 My. & Cr. 29	465

Q.

Quarman *v.* Burnett	6 M. & W. 499	305

R.

Radcliffe Investment Company, Ex parte	Law Rep. 17 Eq. 121	252
Radde *v.* Norman	Law Rep. 14 Eq. 348	141
Randfield *v.* Randfield	2 De G. & J. 57	153

		PAGE
Rangeley *v.* Midland Railway Company	Law Rep. 3 Ch. 306	731
Rankin *v.* Weguelin	27 Beav. 309	477
Raphael *v.* Thames Valley Railway Company	Law Rep. 2 Ch. 147	732
Ravenscroft *v.* Jones	22 Beav. 669; 4 D. J. & S. 224	465
Rawlins *v.* Powell	1 P. Wms. 297	597
——— *v.* Wickham	3 De G. & J. 304	664
Reade *v.* Bentley	3 K. & J. 271; 4 K. & J. 656	498
Reaston's Estate, In re	Law Rep. 13 Eq. 564	279
Reg. *v.* Bailiffs of Ipswich	2 Ld. Raym. 1232	57
—— *v.* Dean of Rochester	17 Q. B. 1; 20 L. J. (Q. B.) 467	78
—— *v.* Governors of Darlington School	6 Q. B. 682	46
—— *v.* Justices of Hertfordshire	6 Q. B. 753	77
—— *v.* Justices of Suffolk	18 Q. B. 416	49
—— *v.* Rand	Law Rep. 1 Q. B. 230	50
—— *v.* Wycombe Railway Company	Law Rep. 2 Q. B. 310	731
Rex *v.* Archbishop of Canterbury	15 East, 117	75
—— *v.* Barnard's Inn	5 A. & E. 17	133
—— *v.* Benchers of Lincoln's Inn	4 B. & C. 855	133
—— *v.* Bishop of London	13 East, 419	57
—— *v.* Campion	1 Sid. 14	69
—— *v.* Gray's Inn	1 Doug. 353	132
—— *v.* Pedley	1 A. & E. 822	304
Reynish *v.* Martin	3 Atk. 330	512
Rhodes *v.* Rhodes	Joh. 653	166
Rich *v.* Basterfield	4 C. B. 783	304
Richards *v.* Delbridge	Law Rep. 18 Eq. 11	477
——— *v.* Richards	Joh. 754	10
Richardson *v.* Greese	3 Atk. 65	600
——— *v.* Richardson	Law Rep. 3 Eq. 686	13
Rickard *v.* Robson	31 Beav. 244	116
Rigley's Trust, Re	15 W. R. 190	116
Rishton *v.* Cobb	9 Sim. 615; 5 My. & Cr. 145	513
River Dun Navigation Company *v.* North Midland Railway Company	1 Railw. Cas. 135	746
Roberdeau *v.* Rous	1 Atk. 543	123
Roberts *v.* Walker	1 Russ. & My. 752	517
Robertson *v.* Lockie	15 Sim. 285	268
Robey & Co.'s Perseverance Ironworks *v.* Ollier	Law Rep. 7 Ch. 695	286
Robinson *v.* Evans	22 W. R. 199	690
——— *v.* Governors of London Hospital	10 Hare, 19	90
——— *v.* Whitley	9 Ves. 577	464
Robinson's Executors' Case	2 D. M. & G. 517	509
Rochford *v.* Hackman	9 Hare, 475	511
Rodgers *v.* Comptoir d'Escompte de Paris	Law Rep. 3 P. C. 465	660
Rolland *v.* Hart	Law Rep. 6 Ch. 678	355
Rollins *v.* Hinks	Law Rep. 13 Eq. 355	334
Roney's Case	4 D. J. & S. 426	432
Rooke's Case	5 Rep. 99 b.	50
Roome *v.* Roome	3 Atk. 181	465
Rose *v.* Cornish	16 L. T. (N.S.) 786	441
Ross *v.* Gibbs	Law Rep. 8 Eq. 522	652
—— *v.* Ross	1 Jac. & W. 154	154
Row *v.* Row	Law Rep. 7 Eq. 414	579
Roy *v.* Duke of Beaufort	2 Atk. 190	520
Rundell *v.* Murray	Jac. 311	452
Russell *v.* Kellett	3 Sm. & Giff. 264	205

S.

		PAGE
Saberton *v.* Skeels	1 Russ. & My. 587	690
St. Aubyn *v.* Smart	Law Rep. 5 Eq. 183; Ibid. 3 Ch. 646	626
Sainter *v.* Ferguson	7 C. B. 716; 1 Mac. & G. 286	520
Sale *v.* Lambert	Law Rep. 18 Eq. 1	6
Saunders *v.* Dehew	2 Vern. 271	563
——— *v.* Smith	3 My. & Cr. 711	452
Saxby *v.* Manchester, Sheffield, and Lincolnshire Railway Company	Law Rep. 4 C. P. 198	304
Sayer *v.* Bennett	1 Cox, 107.	268
Scales *v.* Maud	6 D. M. & G. 43	477
Schofield *v.* Heap	27 Beav. 93	465
Scott *v.* Tyler	2 Dick. 712; 3 Bro. C. C. 431	512
Scrimgeour's Claim	Law Rep. 8 Ch. 921	187
Seixo *v.* Provezende	Law Rep. 1 Ch. 192	140
Selby *v.* Bowie	9 Jur. (N.S.) 425	641
Selsey (Lord) *v.* Rhoades	2 S. & S. 41; 1 Bli. 1	534
Sharples *v.* Adams	32 Beav. 213	559
Sheppard *v.* Duke	9 Sim. 567	247
Sherratt *v.* Mountford	Law Rep. 8 Ch. 928	505
Shirt *v.* Westby	16 Ves. 393	302
Shudal *v.* Jekyll	2 Atk. 516	465
Sidney's Case	Law Rep. 13 Eq. 228	432
Sinnett *v.* Herbert	Law Rep. 7 Ch. 232	116
Skelton *v.* Cole	1 De G. & J. 587	3
Skinner *v.* M'Douall	2 De G. & Sm. 265	181
Skrymsher *v.* Northcote	1 Sw. 566	579
Slater *v.* Jones	Law Rep. 8 Ex. 186	252
Smith *v.* Lidiard	3 K. & J. 252	505
——— *v.* Smith	3 Giff. 121	600
Snellgrove *v.* Baily	3 Atk. 214	479
South, In re	Law Rep. 9 Ch. 369	299
Southampton (Lord) *v.* Marquis of Hertford	2 V. & B. 54	494
Spargo's Case	Law Rep. 8 Ch. 407	105, 674
Spinks *v.* Robins	2 Atk. 491	465
Springett *v.* Dashwood	2 Giff. 521	361
Spurway *v.* Glynn	9 Ves. 483	302
Staight *v.* Burn	Law Rep. 5 Ch. 163	547
Stanhope, Ex parte	19 L. J. (Ch.) 389	509
State Fire Insurance Company, In re	2 H. & M. 722; 34 L. J. (Ch.) 58	164
Stead *v.* Hardaker	Law Rep. 15 Eq. 175	579
Stevens *v.* Benning	1 K. & J. 168	499
Stewart *v.* Black	Murray, Young, Tennent, & Fraser's Reports, Vol. IX. (decisions in Court of Session) 2nd Series, 1846-47, p. 1026	449
Stone *v.* Commercial Railway Company	1 Railw. Cas. 375	726
Straker *v.* Wilson	Law Rep. 6 Ch. 503	698
Stretton *v.* Great Western and Brentford Railway Company	Law Rep. 5 Ch. 751	746
Stringer's Case	Law Rep. 4 Ch. 475	674
Sturgeon *v.* Wingfield	15 M. & W. 224	230
Sturt & Co., Ex parte	Law Rep. 13 Eq. 309	378
Swaine *v.* Great Northern Railway Company	9 Jur. (N.S.) 1196; 10 Jur. (N.S.) 191	747

		PAGE
Sweet *v.* Cater	11 Sim. 572	499
Sykes *v.* Sykes	3 B. & C. 541	140

T.

Talbot *v.* Shrewsbury	Prec. Ch. 394	598
Tapling *v.* Jones	11 H. L. C. 290	547
Taylor *v.* Cartwright	Law Rep. 14 Eq. 167	465
——— *v.* Manners	Law Rep. 1 Ch. 48	316
——— *v.* Taylor	Law Rep. 10 Eq. 477	21
——— *v.* ———	Law Rep. 17 Eq. 324	412
Tench *v.* Cheese	6 D. M. & G. 453	517
Tew *v.* Lord Winterton	1 Ves. 451	166
Thackeray *v.* Parker	1 N. R. 567	195
Thomas, Ex parte. In re New Zealand Kapanga Gold Mining Company	Law Rep. 18 Eq. 17, n.	17
Thomas *v.* Rawlings	34 Beav. 50	575
Thompson, Ex parte	1 Ves. 157	376
——— *v.* Corby	27 Beav. 649	207
——— *v.* Drew	20 Beav. 49	163
Thorn *v.* Commissioners of Public Works	32 Beav. 490	675
Thorpe *v.* Holdsworth	Law Rep. 7 Eq. 139	226
Thynne *v.* Earl of Glengall	2 H. L. C. 131	601
Tipping *v.* Eckersley	2 K. & J. 264	263
Todd *v.* Flight	9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21	304
Toller *v.* Carteret	2 Vern. 494	121
Tothill's Case	Law Rep. 1 Ch. 85	432
Treherne, Ex parte	2 D. F. & J. 656	708
Trimmer *v.* Bayne	7 Ves. 508	463
Trustees of Tid St. Giles Charity, Ex parte	17 W. R. 758	279
Turner, In re	2 Dr. & Sm. 501	689
Tyrrell *v.* Clark	2 Drew, 86	214

V.

Varlo *v.* Faden	27 Beav. 255	494
Vaughan *v.* Buck	1 Ph. 75	426
Veal *v.* Veal	27 Beav. 303	477
Viney *v.* Chaplin	2 De G. & J. 468	631
Vizard's Trusts, In re	Law Rep. 1 Ch. 588	590

W.

Wall *v.* Tomlinson	16 Ves. 413	488
Wallace *v.* Kelsall	7 M. & W. 264	226
Wallwyn *v.* Lee	9 Ves. 24	227
Walter *v.* Hodge	2 Sw. 92	476
——— *v.* Selfe	4 De G. & Sm. 315	176
Ward *v.* Arch	15 Sim. 389	248
——— *v.* Turner	2 Ves. Sen. 431	478
Warde, In re	2 J. & H. 191	281
Ware *v.* Mallard	16 Jur. 492	415
Warriner *v.* Rogers	Law Rep. 16 Eq. 340	12, 476

		PAGE
Waters *v.* Taylor	2 V. & B. 299	268
Wathen *v.* Smith	4 Madd. 325	598
Watkins *v.* Williams	3 Mac. & G. 622	153
Watson *v.* Watson	33 Beav. 574	465
Weall *v.* Rice	2 Russ. & My. 251	597
Webb *v.* Grace	2 Ph. 701	511
—— *v.* Ledsam	1 K. & J. 385	226
—— *v.* Manchester and Leeds Railway Company	4 My. & Cr. 116	725
—— *v.* Wools	2 Sim. (N.S.) 267	415
Webber *v.* Corbett	Law Rep. 16 Eq. 515	427
Webb's Policy, In re	Law Rep. 2 Eq. 456	657
Welch *v.* Knott	4 K. & J. 747	141
Wheatley *v.* Purr	1 Keen, 551	12
—— *v.* Slade	4 Sim. 126	684
Wheeler *v.* Collier	1 Moo. & M. 123	2
Whiston *v.* Dean of Rochester	7 Hare, 532	56
White *v.* White	7 Ves. 423	206
Whitehead *v.* Whitehead	Law Rep. 16 Eq. 528	329
Wier, Ex parte	Law Rep. 6 Ch. 875	378
Wight's Mortgage Trust, In re	Law Rep. 16 Eq. 41	353
Williams *v.* Byrne	9 Jur. (N.S.) 363	3, 7
—— *v.* Lake	2 E. & B. 349; 29 L. J. (Q.B.) 1	3, 7
Willis *v.* Childe	13 Beav. 117	47
Willoughby *v.* Middleton	2 J. & H. 344	591
Wilson *v.* Halliley	1 Russ. & My. 590	493
—— *v.* Lloyd	Law Rep. 16 Eq. 60	252
Wood *v.* Charing Cross Railway Company	33 Beav. 290	747
Woollam *v.* Ratcliff	1 H. & M. 259	141
Woollaston's Case	4 De G. & J. 437	509
Wormald *v.* Maitland	35 L. J. (Ch.) 69	355
Wotherspoon *v.* Currie	Law Rep. 5 H. L. 508	140
Wright *v.* Stanfield	27 Beav. 8	353
Wrigley *v.* Lancashire and Yorkshire Railway Company	4 Giff. 352; 9 Jur. (N.S.) 710	726
Wyatt *v.* Barwell	19 Ves. 435	353
Wyndham's Trusts, In re	Law Rep. 1 Eq. 290	689

Y.

Yates *v.* Jack	Law Rep. 1 Ch. 295	549
—— *v.* Phettiplace	2 Vern. 416	512
Yeomans *v.* Williams	Law Rep. 1 Eq. 184	316
Young *v.* Timmins	1 C. & J. 331	521
—— *v.* Young	Law Rep. 13 Eq. 175, n.	388

NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

SALE *v.* LAMBERT.

[1873 S. 110.]

M. R.
1874
March 2.

Sale of Real Estate—Memorandum of Agreement—Vendor not named, but described as Proprietor—Signature by Auctioneer—Statute of Frauds.

Upon a sale by auction of real estate in lots the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor:—

Held, that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the *Statute of Frauds:* and specific performance of the agreement decreed at the suit of the purchaser.

THIS was a suit by a purchaser of real estate against the vendor for specific performance.

On the 19th of July, 1872, the Defendant, *James Lambert*, caused certain real estate (to which the Defendant was entitled in fee simple) to be put up for sale by auction in six lots, according to printed particulars and conditions of sale, which stated

M. R. 1874 SALE v. LAMBERT.

that the property was to be sold "by direction of the proprietor," but did not contain the name or any other description of the vendor. The Plaintiff, *William Sale*, became the purchaser of Lots 3, 5, and 6, at sums amounting to £1242, and a memorandum was indorsed on a copy of the particular and conditions of sale, and signed by the Plaintiff and by Mr. *George Jackson*, the auctioneer at the sale, on behalf of the Defendant. The memorandum was as follows:—

"Memorandum of agreement on sale of an estate by auction at *Baldock* on the 19th day of July, 1872, as follows:—

"I do hereby acknowledge that Mr. *William Sale*, by Mr. *Thomas Veasey*, his solicitor, has been this day declared the purchaser of Lots 3, 5, and 6, mentioned and described in the particular hereto annexed, at the sum of £1242, and that he has paid a deposit of £186. And I do hereby agree that the vendor on his part shall in all respects fulfil the conditions of sale mentioned in the said particular.

"Witness my hand this 19th day of July, 1872.

	£	*s.*	*d.*
"Purchase-money	1242	0	0
"Deposit paid	186	0	0
"Remains due	1056	0	0

"*George Jackson.*

"Approved by me, "July 19, 1872.

"*Wm. Sale.*"

The bill was filed to enforce the agreement for sale. The Defendant (who did not deny that he was the vendor) raised three defences, of which it is only necessary to mention the second, namely, that there was no memorandum in writing of the agreement such as to satisfy the requirements of the *Statute of Frauds*.

The *Solicitor-General* (Sir *R. Baggallay*), and Mr. *Charles Walker*, for the Plaintiff.

Mr. *Southgate*, Q.C., and Mr. *Dauney*, for the Defendant:—

The written memorandum does not shew who the vendor is, and therefore is insufficient: *Wheeler* v. *Collier* (1); *Jacob* v. *Kirk* (2);

(1) Mood. & M. 123. (2) 2 Mood. & Rob. 221.

Williams v. *Lake* (1); *Williams* v. *Byrne* (2); *Skelton* v. *Cole* (3); *Dart's* Vendors and Purchasers (4). In *Hood* v. *Lord Barrington* (5) the particulars stated that the property had belonged to Admiral *F.*, deceased, and that the sale was by direction of his executors, and that was held sufficient. But the office of executor is one known to the law, and clearly defined, and though the executors' names did not appear, the maxim, *Id certum est quod certum reddi potest*, applied. Here the sale is said to be by direction of the "proprietor." That word is a vague and popular expression, and not a sufficient description of the vendor.

SIR G. JESSEL, M.R., after disposing of the first objection taken by the Defendant, continued :—

The second objection is one of general importance. It is said that there is no memorandum in writing of the agreement such as to satisfy the *Statute of Frauds* because the vendor's name does not appear. That is very important, because it is not the usual practice to put the vendor's name in the particulars of sale, and I do not remember having ever seen particulars of sale in the form in which the vendor says they ought to be. However, the question is, what is the law on the subject? Mr. *Dart* states it thus: "It appears to be now clearly settled that in order to satisfy the statute *both* parties should be specified, either nominally or by a sufficient description." With that statement I do not quarrel; the only question is, what is a sufficient description?

It is not necessary to decide this point here. The question is, can you find out from the memorandum who the vendor is? The property is stated to be put up for sale "by direction of the proprietor." Therefore the proprietor is the vendor, and is referred to as being the person who employs the auctioneer to sell. What more do you want? It is said that the term "proprietor" is not a sufficient description; I think that it is an excellent description; certainly in Acts of Parliament the proprietor or owner is frequently mentioned as the person on whom notices are to be served, and the like.

(1) 29 L. J. (Q.B.) 1. (3) 1 De G. & J. 587.
(2) 9 Jur. (N.S.) 363. (4) 4th Ed. p. 202.
(5) Law Rep. 6 Eq. 218.

M. R. 1874 SALE v. LAMBERT.

If authority is wanting for this decision, I think *Hood* v. *Lord Barrington* (1) is in point: but I do not think that any authority is really wanted. I am clear that on this memorandum the vendor is sufficiently described, and that it is a good memorandum within the statute.

His Honour then overruled the remaining objections which had been raised on behalf of the Defendant, and made the usual decree for specific performance, and ordered the Defendant to pay the costs up to the hearing.

Solicitors: Mr. *S. W. Johnson;* Mr. *Balderston.*

M. R. 1874 *April* 17.

POTTER *v.* DUFFIELD.

[1870 P. 124.]

Sale of Real Estate—Memorandum of Contract—Name of Vendor—Statute of Frauds.

In order to satisfy the requirements of the *Statute of Frauds*, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity.

The term "vendor" is not of itself a sufficient description of one of the contracting parties.

Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that *B.* was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and *B.* signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor. *B.*":—

Held, that the memorandum did not sufficiently shew who the vendor was; and a bill for specific performance of the contract for sale was dismissed.

ON the 20th of August, 1869, certain real estate was put up for sale by auction in four lots, under printed particulars and conditions of sale, which did not disclose the vendor's name, and in some places spoke of "vendors" in the plural, although for the most part the word "vendor," in the singular, was used. It appeared therefrom that Messrs. *Duffield & Bruty* acted as the vendor's solicitors, and that Messrs. *Beadel* were the auctioneers.

(1) Law Rep. 6 Eq. 218.

Mr. *John Rogers*, the Plaintiff's agent, attended the sale, and was declared to be the highest bidder for Lot 2, and paid the deposit; and he and Messrs. *Beadel* signed the following memorandum, which was endorsed on a copy of the particulars and conditions of sale:—

"Memorandum.

"I *John Rogers*, of *Maldon*, do hereby acknowledge myself to be the purchaser of Lot 2 of the property described in the foregoing particulars, for the sum of £200; and having paid the auctioneer £20 as a deposit and in part payment of the purchase money, I hereby bind myself, my heirs, executors, administrators and assigns, to pay the balance of the purchase money, and to complete the purchase, subject and according to the foregoing particulars and conditions of sale. Dated this 20th day of August, 1869.

"Amount of sale . . .	£200 0 0
Deposit	20 0 0
Balance	£180 0 0

John Rogers.

Confirmed on behalf of the vendor,
Beadels,
Per *N. J.*,
Aug. 20th, 1869."

No abstract was sent in accordance with the conditions of sale, and on the 5th of October, 1869, the Plaintiff's solicitors wrote to Messrs. *Duffield & Bruty* asking to be furnished with the proper abstract. Mr. *Duffield*, a member of that firm, replied, on the 6th of October, that certain mortgagees of the property refused to concur in the sale, and it was therefore useless to send an abstract; and he offered to return the deposit. Mr. *Duffield* also subsequently offered to pay the Plaintiff any costs he had incurred up to that date. The Plaintiff refused to accept these offers, and instituted this suit against Mr. *Duffield*, alleging that he was the vendor, and praying for specific performance of the contract.

Mr. *Duffield*, by his answer, submitted that there was no memorandum in writing of the alleged contract such as to satisfy the *Statute of Frauds;* he denied that he was the vendor of the real estate in question, and stated that the vendor was in fact one

M. R. 1874 POTTER v. DUFFIELD.

William Polley. *William Polley* was entitled in fee simple to the equity of redemption in the property, subject to three mortgages. The third of these three mortgages was vested in Mr. *Duffield*, who had under it a power of sale over the property.

The cause now came on to be heard. The evidence was conflicting. *William Polley*, in an affidavit filed on behalf of the Plaintiff, alleged that he had never in any way authorized the sale. On the other hand, one of the firm of Messrs. *Beadel*, who was a witness for the Defendant, stated that he received instructions from Mr. *Bruty* (of the firm of *Duffield & Bruty*) on behalf of *William Polley;* and he referred to his books, in which all matters relating to the sale were entered under the heading, "*Re* Mr. *William Polley's* Estate." One of such entries was of an interview which he had on the 20th of August, 1869, with Mr. *Polley* and Mr. *Duffield* as to the reserved prices of the lots at the proposed sale. By an affidavit in reply *Polley* denied that any such interview took place.

Mr. *Rooth* (Mr. *Roxburgh*, Q.C., with him) for the Plaintiff:—

The memorandum is sufficient to satisfy the *Statute of Frauds*, although the vendor's name does not appear. The vendor is the person who employed Messrs. *Beadel* as his agents, and there is nothing to prevent our shewing by parol evidence who Messrs. *Beadel's* principal was. In fact the word "vendor," as used in this memorandum, is as good a description of one of the contracting parties, as the term "executor," which was held sufficient in *Hood* v. *Lord Barrington* (1), or "proprietor," which was held sufficient in *Sale* v. *Lambert* (2). The observations of Lord *Romilly*, in the former case, are strongly in favour of the Plaintiff.

He also contended that the evidence shewed that the Defendant was the vendor.

Mr. *Southgate*, Q.C., and Mr. *Begg*, for the Defendant, were not called upon.

SIR G. JESSEL, M.R.:—

I am of opinion that no contract whatever is proved in this case. The *Statute of Frauds* requires that an agreement for the sale

(1) Law Rep. 6 Eq. 218. (2) *Ante*, p. 1.

of lands, or some memorandum or note thereof, shall be in writing. The present Lord Chief Justice, in *Williams* v. *Lake* (1), explains that to mean that the essentials of the agreement must be stated in writing; and amongst the essentials he mentions the subject-matter of the agreement, and the names of the contracting parties. Here we have a contract with one of the contracting parties neither named nor described. I use the word "described" because I think the statement in the judgment in *Williams* v. *Lake*, that the memorandum ought to contain the names of the parties, must have been made with reference to the particular circumstances of that case. That appears from the terms in which the law is laid down by Sir *John Taylor Coleridge* in the case of *Williams* v. *Byrnes* (2). He says: "The words require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference." I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. The Counsel for the Plaintiff contends that you may describe one of the parties as the vendor of the estate; but the statute cannot mean that. It requires the parties to be described in such a manner as that there can be no fair or reasonable dispute as to the person who is selling or buying. I recently held that the description "proprietor" would be sufficient, there being but one person who answered the description. In the same way the estate must be sufficiently described. In some cases the mere name of the owner may be sufficient, as "*A. B.'s* estate;" in other cases (as where the same person has more than one estate) you must have some other and more complete description.

6 Ch D. 579.

In this case what have we? We have a memorandum in which the purchaser first states, in the usual manner, that he has purchased; and then we have these words: "Confirmed on behalf of the vendor, *Beadels*," Messrs. *Beadel* being the auctioneers. There is not a syllable in the particulars of sale to shew who the vendor is; and in fact, so far from it being clear that there is a single

(1) 2 E. & E. 349; 29 L. J. (Q.B.) 1. (2) 9 Jur. (N.S.) 363.

6 Jur. N.S. 945

M. R. 1874 POTTER v. DUFFIELD.

vendor, in one part the word is "vendor" and in another "vendors," so that it is by no means clear that there are not several persons selling.

That being so, this bill is filed against a gentleman named *Duffield*, who says, "I never was the vendor." It is not a case in which the Defendant admits that he was the vendor and pleads the *Statute of Frauds*, but it is a case in which he says he was not; and, what is more, I think he has proved that he was not. He is a solicitor, in partnership with a gentleman named *Bruty*, the firm being *Duffield & Bruty*. They were the solicitors for a person named *Polley*. *Polley* had made two mortgages of the estate for a considerable amount, and he had also obtained a third loan from Mr. *Duffield*, who, being the third mortgagee and having a power of sale, could have sold the estate. But what he says is this: "My firm, as solicitors for *Polley*, instructed Messrs. *Beadel*;" and not only does he say so, but Mr. *Beadel* says so, and produces his books, in which *Polley* is described as the owner of the estate, and an interview is mentioned, at which *Polley* was present and the reserved price was discussed. Again, when we look at the particulars of sale we find *Duffield & Bruty* named as solicitors to the vendor, which is an odd thing if *Duffield* alone were the vendor. The whole of the evidence, if it can be gone into at all, appears to shew that, whether Messrs. *Duffield & Bruty* were or were not right in thinking they had *Polley's* authority, they did think they had *Polley's* authority, and they did instruct Mr. *Beadel* to sell on behalf of *Polley*, and that Mr. *Beadel* accepted the instructions to sell on his behalf; and therefore, if you could go into the evidence as to the person who is described as vendor by Mr. *Beadel*, the answer Mr. *Beadel* would give would be that *Polley* was that person. But that is exactly what the Act says shall not be decided by parol evidence. I should be thrown on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing. I think we could not have a clearer or better illustration of the difficulties which would arise if I were to interpret the statute otherwise, than that in this case I should have to decide on the parol evidence of Mr. *Duffield*, Mr. *Beadel*, and Mr. *Polley*, as to who was in fact the real vendor.

That being so, I think there is no contract such as to satisfy the

M. R.
1874
POTTER
v.
DUFFIELD.

statute. It also appears that the Plaintiff was informed, before the bill was filed, of the real circumstances of the case, and was told that the mortgagees, whose consent to the sale had been anticipated, and who had given their consent on the very reasonable condition that the estate should be sold so as to pay them off, would not concur in the sale, and the vendor was not able to pay them off. With that the Plaintiff does not choose to be satisfied; but having received that information, with an offer for the return of the deposit and his costs up to that time, he then, not only without any evidence in support of the allegation that Mr. *Duffield* was the vendor, but without any contract which could be supported according to the provisions of the statute, chooses to file his bill. Under these circumstances I must dismiss the bill with costs.

Solicitors: Messrs. *Denton, Hall, & Barker;* Messrs. *Duffield & Bruty.*

In re MOWLEM.

M. R.
1874
March 3.

Devise—Estate Tail—Child en ventre sa mère—Intermediate Rents.

Devise to trustees to the use of the first and other sons of *M.* in tail male, with a residuary devise. Three months after the testator's death the first son of *M.* was born:—

Held, that the residuary devisees were entitled to the intermediate rents from the testator's death to the birth of the tenant in tail.

JOHN MOWLEM, by his will, dated the 2nd of May, 1865, devised certain real estates to trustees to the use of the first and every other son of the testator's nephew, *Thomas Joseph Mowlem*, severally and successively, according to their respective seniorities of age and priority of birth, in tail male, with divers remainders over, and an ultimate remainder to the testator's right heirs; and the testator gave and bequeathed the residue of his real and personal estate to his trustees upon and for the trusts and purposes in the said will mentioned.

The testator died on the 8th of March, 1868. The said *Thomas Joseph Mowlem* was then married, and had daughters, but no son. His wife was, however, at that time *enceinte*, and on the 6th of

M. R. 1874 *In re* MOWLEM.

July, 1868, gave birth to a son, who became the infant tenant in tail of the estate.

The trustees on the testator's death had entered into the receipt of the devised estates.

The question arose who was entitled to the *interim* rents of the estate between the dates of the testator's death and the birth of the child.

Mr. *Fry*, Q.C., and Mr. *Rodwell*, for the infant, submitted that he was entitled to the immediate rents. In *Goodale* v. *Gawthorne* (1), where a tenant in fee died leaving his wife *enceinte*, and leaving two sisters his co-heiresses at law with defeasible rights, on the birth of a son, who became the absolute heir, he was held to be entitled to the rents that had accrued between the death of the father and his own birth.

Mr. *Southgate*, Q.C., and Mr. *E. S. Ford*, for the trustees, referred to *Richards* v. *Richards* (2), where it was held that a posthumous heir was entitled to the rents of a descended estate only from the date of his birth, and that the presumptive heir was entitled to the intermediate rents.

SIR G. JESSEL, M.R.:—

If there had been no residuary devise in this will the heir-at-law would have been entitled to the intermediate rents. As, however, there is a residuary devise, the residuary devisees are entitled, and the trustees who have entered and received the rents are trustees of the rents in question for such residuary devisees. It is singular that such a question should come before the Court in the year 1874.

Solicitors: Messrs. *Hedges & Brandreth.*

(1) 2 Sm. & Giff. 375. (2) Joh. 754.

RICHARDS *v.* DELBRIDGE.

M. R.

1874

April 16.

[1874 B. 18.]

Voluntary Gift—Intended Transfer of Property—Invalid Declaration of Trust.

D., who was possessed of leasehold business premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson *E.*, who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all thereto belonging I give to *E.* from this time forth, with all the stock-in-trade." The lease was then delivered to *E.*'s mother on his behalf:—

Held, that there was no valid declaration of trust of the property in favour of *E.*

Richardson v. *Richardson* (1), and *Morgan* v. *Malleson* (2), not followed.

DEMURRER.

The bill, filed by *Edward Bennetto Richards*, an infant, by his next friend, stated that *John Delbridge*, deceased, was possessed of a mill, with the plant, machinery, and stock-in-trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863.

That on the 7th of March, 1873, *John Delbridge* indorsed upon the lease and signed the following memorandum:—

"7th March, 1873. This deed and all thereto belonging I give to *Edward Bennetto Richards* from this time forth, with all the stock-in-trade.

"*John Delbridge.*"

That the Plaintiff was the person named in the memorandum, and the grandson of *John Delbridge*, and had then for some time assisted him in the business; that *John Delbridge*, shortly after signing the memorandum, delivered the lease on his behalf to *Elizabeth Ann Richards*, the Plaintiff's mother, who was still in possession thereof.

That *John Delbridge* died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but gave his furniture and effects, after his wife's death, to be divided among his family.

(1) Law Rep. 3 Eq. 686. (2) Law Rep. 10 Eq. 475.

M. R.
1874
RICHARDS
v.
DELBRIDGE.

That the testator's widow, *Elizabeth Richards*, took out administration to his estate, with the testamentary papers annexed.

The bill, which was filed against the Defendants *Elizabeth Delbridge*, *Elizabeth Ann Richards*, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by *John Delbridge* and the delivery of the lease to *Elizabeth Ann Richards* created a valid trust in favour of the Plaintiff of the lease and of the estate and interest of *John Delbridge* in the property therein comprised, and in the goodwill of the business carried on there, and in the implements and stock-in-trade belonging to the business.

The Defendants demurred to the bill for want of equity.

Mr. *Fry*, Q.C., and Mr. *Phear*, in support of the demurrer:—

The memorandum of the 7th of March, 1873, did not operate as a valid gift of the leasehold property to the infant Plaintiff, as it was not an instrument under seal, nor of the stock-in-trade, as there was neither seal nor delivery. The gift was only intended to take effect by transfer; as there was no transfer, the memorandum cannot be converted into a declaration of trust, for a voluntary settlement intended to be effectuated in one manner cannot have effect given to it in another.

This last point is determined by *Milroy* v. *Lord* (1), followed by *Warriner* v. *Rogers* (2).

Mr. *W. R. Fisher* (Mr. *Southgate*, Q.C., with him), for the Plaintiff:—

Although there is no equity to perfect an imperfect gift, yet where there is a clear intention to declare a trust of property, the Court will hold that an instrument, however informal, constitutes a valid declaration of trust. This appears from many cases, among which may be cited *Ex parte Pye* (3) and *Kekewich* v. *Manning* (4).

[The MASTER OF THE ROLLS:—That was the law of the Court down to the time of *Kekewich* v. *Manning*.]

The same principle was followed in *Wheatley* v. *Purr* (5). In

(1) 4 D. F. & J. 264. (3) 18 Ves. 140.
(2) Law Rep. 16 Eq. 340. (4) 1 D. M. & G. 176.
(5) 1 Keen, 551.

Richardson v. *Richardson* (1) a voluntary deed, whereby a donor purported to assign certain specific property and all other her personal estate to *B.*, was held to pass the property in certain promissory notes, not specifically mentioned in the deed, which were found in the donor's possession at her death, though the notes had not been indorsed, and there was no evidence of their delivery to *B.* This was on the principle that the deed of assignment operated as a complete declaration of trust of all the donor's property in favour of *B.*

In *Morgan* v. *Malleson* (2) a memorandum of a voluntary gift in this form: "I hereby make over to *M.* an *India* bond, value £1000," was signed by *S.*, and given by him to *M.* without handing over the bond. *S.* died, and the residuary devisees under his will claimed the bond. It was there held by Lord *Romilly* that the memorandum was a good declaration of trust in favour of *M.*

It is submitted that there is a sufficient intention shewn here, and that a valid declaration of trust has been created in favour of the Plaintiff.

Mr. *Fry* was heard in reply on the case of *Richardson* v. *Richardson.*

SIR G. JESSEL, M.R.:—

This bill is warranted by the decisions in *Richardson* v. *Richardson* and *Morgan* v. *Malleson*; but, on the other hand, we have the case of *Milroy* v. *Lord* (3), before the Court of Appeal, and the more recent case of *Warriner* v. *Rogers* (4), in which Vice-Chancellor *Bacon* said: "The rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to" (*Richardson* v. *Richardson* and *Morgan* v. *Malleson*), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust —the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

(1) Law Rep. 3 Eq. 686.
(2) Ibid. 10 Eq. 475.
(3) 4 D. F. & J. 264.
(4) Law Rep. 16 Eq. 340, 348.

M. R. 1874 — RICHARDS v. DELBRIDGE.

The two first-mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the Judges appear to have taken different views of the construction of certain expressions, but I am not bound by another Judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, "I give or grant certain property to *A. B.*" Thus, in *Morgan* v. *Malleson* (1) the words were, "I hereby give and make over to Dr. *Morris* an *India* bond;" and in *Richardson* v. *Richardson* (2) the words were, "grant, convey, and assign." In both cases the Judges held that the words were effectual declarations of trust. In the former case, Lord *Romilly* considered that the words were the same as these: "I undertake to hold the bond for you," which would undoubtedly have amounted to a declaration of trust.

(1) Law Rep. 10 Eq. 475. (2) Law Rep. 3 Eq. 686.

The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In *Milroy* v. *Lord* (1), Lord Justice *Turner*, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord *Romilly* and of Vice-Chancellor *Wood* were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the Court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature which this Court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer, and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.

Solicitor for the Plaintiff: Mr. *T. D. Bolton*, agent for Messrs. *Hill & Hill, Helston.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Carlyon & Paull, Truro.*

(1) 4 D. F. & J. 264, 274.

M. R.
1874
April 25.

In re DENTON COLLIERY COMPANY. *Ex parte* SHAW.

Company—Issue of fully Paid-up Shares—Non-Registration of Contract—Mistake—Rectification of Register—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Post 543
14 Ch D 636

Where fully paid-up shares had been issued in pursuance of a contract which had not been registered in accordance with sect. 25 of the *Companies Act*, 1867, on an application under sect. 35 of the *Companies Act*, 1862, to which the company consented, the Court made an order to rectify the register by striking out the names of the holders, and that shares should be re-issued after the registration of the contract, it appearing that the holders had accepted the shares in ignorance of the omission to register the contract.

THE *Denton Colliery Company* was registered on the 18th of September, 1872, as a limited company, having a capital of £40,000, divided into 4000 shares of £10 each.

In 1873 the company entered into a contract with Messrs. *Shaw* for the purchase from them of certain collieries for the sum of £27,000, of which £6000 was to be paid in fully paid-up shares of the company. The contract was carried into effect, and the shares were allotted to Messrs. *Shaw*, whose names were entered on the register of shareholders. No written contract, however, was registered, in accordance with the provisions of the *Companies Act*, 1867, s. 25.

Messrs. *Shaw* now presented a Petition, stating that the shares had been issued to and accepted by them in ignorance on their part of the fact that the necessary documents had not been filed, and praying that their names might be struck off the register; and that, upon the contract being duly registered, the company might be ordered to restore their names as holders of the same shares.

Mr. *Marten*, Q.C., for the Petition.

Mr. *W. F. Robinson*, for the company, consented.

SIR G. JESSEL, M.R., following the decision in the case of *In re*

New Zealand Kapanga Gold Mining Company (1), made the order, but remarked, however, that the application might have been made by motion.

M. R.
1874
In re DENTON COLLIERY COMPANY.
Ex parte SHAW.

Solicitors: Messrs. *Milne, Riddle, & Mellor;* Messrs. *Chester, Urquhart, & Co.*

(1) 1873. June 19, 26. L.C. for M.R.

In re NEW ZEALAND KAPANGA GOLD MINING COMPANY.
Ex parte THOMAS.

ON the 25th of April, 1872, a contract in writing was entered into between *William Charles Hemings* and *Thomas Frederick Hurley*, whereby *Hemings* agreed to sell to *Hurley* (who was described as a trustee for or on behalf of a company then intended to be formed under the name of the *New Zealand Kapanga Gold Mining Company, Limited*) certain mining property in *New Zealand*, the purchase-money to be paid partly in cash, and as to the balance in 4000 fully paid-up shares, to be allotted to the vendor or his nominees.

On the 30th of April the memorandum and articles of association were registered. The memorandum stated that one of the objects of the company was to carry into effect the contract in question; and by the 6th of the articles the directors were authorized to issue fully or partly paid-up shares to the vendor under the contract, and by article 43 they were authorized to adopt the contract, which, however, was not set out at length in the memorandum or articles.

On the 16th of September, 1872, the directors passed a resolution that 4000 fully paid-up shares be allotted to the vendor, and on the same day 3750 of these shares were registered in the names of nominees of the vendor, and described in the register as fully paid up.

The contract with *Hemings* was not registered with the Registrar of Joint Stock Companies until April, 1873.

A motion was now made by the allottees of the 3750 shares to rectify the register by striking out their names, on the ground that the shares were not properly issued as fully paid up, in consequence of the contract not having been registered until after the issue of the shares.

The company were willing that the register should be rectified, and that fresh shares should be issued to the allottees.

Mr. *Southgate*, Q.C., and Mr. *Beale*, for the allottees.

Mr. *E. Ward*, for the company.

LORD SELBORNE, L.C., said that the motion must stand over for the production of evidence that the allottees were ignorant of the omission of the directors to register the contract before the issue of the shares; if the allottees were not ignorant of the omission, it might be difficult to relieve the allottees from the consequences of their mistake of law.

June 26. Satisfactory evidence having been adduced on the point mentioned by the Lord Chancellor, the order asked for was made.

Solicitors: Messrs. *Sharpe, Parkers, & Co.;* Messrs. *Newman, Dale, & Stretton.*

M. R.

1874

April 20.

JERVIS *v.* WOLFERSTAN.

[1873 J. 19.]

Trustee and Cestui que Trust—Indemnity—Liability of Executor—Distribution of Residuary Estate with Notice of Remote Liability—Following Assets—Refunding.

A trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue in the proper execution of the trust.

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund.

The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate: afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed:—

Held, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund.

A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.

The above-mentioned testator had, by the settlement made on the marriage of one of his daughters, covenanted to bequeath or otherwise provide that a certain share of his residuary estate should go to her; and it was by the same settlement agreed that such share should be paid to the trustees and held by them on the trusts of the settlement. The testator accordingly bequeathed the proper share to his daughter, and it was paid by the executors to the trustees of the settlement:—

Held, that the trustees were liable to refund equally with the other residuary legatees.

An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee, without any intermediate income.

ON the 21st of August, 1866, *Swynfen Stevens Jervis* transferred to *Jervis John Jervis* and *Philip Octavius Jervis* 625 fully paid-up shares of £20 each in the *Albert Life Insurance Company*, an unlimited company; and by an indenture of even date, made

between the same parties, it was declared that *J. J. Jervis* and *P. O. Jervis* should stand possessed of these shares upon trust for *Catherine Jervis* (the wife of *Swynfen S. Jervis*) during her life for her separate use, without power of anticipation, and after her death for certain of the children and grandchildren of *Swynfen S. Jervis.*

On the same 21st of August, 1866, *Swynfen S. Jervis* made his will, and thereby bequeathed his residuary personal estate to his two daughters, Mrs. *Broughton* and Mrs. *Brackenbury* (then Mrs. *Wolferstan*), and his son *Walter Neil Jervis*, in equal shares, and he appointed *Jervis John Jervis* and *Philip Octavius Jervis* his executors.

Swynfen S. Jervis died on the 15th of January, 1867.

By an indenture dated the 31st of March, 1856, being the settlement made on the marriage of Mrs. *Broughton*, to which *Swynfen S. Jervis* was a party, it was agreed and declared that he, the said *Swynfen S. Jervis*, should and would bequeath by his will, or otherwise provide, that whatever residue of his personal estate should remain at his decease should be equally divided between his children, Mrs. *Broughton*, Mrs. *Brackenbury*, and *Walter Neil Jervis;* and it was thereby also agreed and declared that such share of Mrs. *Broughton* of the said residue should be paid over by the executors or administrators of *Swynfen S. Jervis* to the trustees of the settlement, to be held by them upon the trusts thereby declared.

By an indenture dated the 22nd of April, 1867 (being the settlement made on the marriage of Mrs. *Brackenbury*), Mrs. *Brackenbury* assigned her share under her father's will to trustees (one of whom was *P. O. Jervis*) upon the trusts thereby declared.

J. J. Jervis and *P. O. Jervis*, as the executors of the testator, got in his personal estate and paid his debts; and after making such payments there remained in their hands a clear residue of £2,649 12*s.* 6*d.* In May, 1869 (having previously issued the usual advertisements for creditors under the statute 22 & 23 Vict. c. 35), they paid over one-third of this sum to the trustees of Mrs. *Broughton's* settlement, and another third to the trustees of Mrs. *Brackenbury's* settlement; and they retained the remaining third for the benefit of *Walter Neil Jervis*, who was then abroad.

M. R.
1874
JERVIS
v.
WOLFERSTAN.

At the time when these payments were made the *Albert Company* was a going concern, and believed to be perfectly solvent; but the executors were aware that the liability on the shares standing in their names as trustees of the settlement of the 21st of August, 1866, was unlimited, and that such liability might possibly fall on *Swynfen S. Jervis's* estate.

In September, 1869, the *Albert Company* was ordered to be wound up, and *J. J. Jervis* and *P. O. Jervis* were settled on the list of contributories, and calls to the amount of £6875 had been made on them in respect of the 625 shares.

After the failure of the company the *cestuis que trust* under the deed of the 21st of August, 1866 (with the exception of Mrs. *Jervis*, the tenant for life, who had received some dividends on the shares), disclaimed. Mrs. *Jervis* was willing to contribute her proper proportion of the amount of calls. The one-third share of *Walter Neil Jervis* in the residuary estate of *Swynfen S. Jervis* had, with his consent, been applied towards payment of the calls.

This suit was instituted by *J. J. Jervis* against Mr. and Mrs. *Broughton*, Mr. and Mrs. *Brackenbury*, and the trustees of their respective settlements, and Mrs. *Jervis*, seeking to be indemnified against the calls on the shares to the extent of the sums paid out of *Swynfen S. Jervis's* estate to the trustees of the settlements, and to obtain repayment from those trustees of such sums.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff:—

All the *cestuis que trust* under the deed of the 21st of August 1866 (with the exception of Mrs. *Jervis*) have disclaimed, and there is, consequently, a resulting trust in favour of *Swynfen S. Jervis*. The Plaintiff and his co-trustee became trustees of the shares at the request of *Swynfen S. Jervis*, who, if he had been living, would have been under an obligation to indemnify the Plaintiff and his co-trustee; and his estate is under a like obligation: *Ex parte Chippendale* (1); *Balsh* v. *Hyham* (2); *Phené* v. *Gillan* (3). Although the Plaintiff was executor, and himself paid over the residuary estate to the trustees of the settlement, still he was quite right in so doing; the possible liability of the estate in respect of

(1) 4 D. M. & G. 19, 54. (2) 2 P. Wms. 453.
(3) 5 Hare, 1.

these shares afforded no ground for the retention of the residue by the executors; and now that the liability has actually ripened into a debt, the executor is entitled to insist on repayment: *Prowse* v. *Spurgin* (1).

Mr. *Fry*, Q.C., and Mr. *Speed*, for Mr. and Mrs. *Broughton* and the trustees of their settlement:—

There is no case in which an executor has been permitted to recover a fund which he knowingly paid away to the wrong person.

The payment was made to us, not as legatees, but as creditors under the covenant in the settlement. It is true that what the testator covenanted to pay was a share of residue; and the amount to be paid therefore depended on the liabilities of the testator; and if the executor had ascertained the true amount of these liabilities, we might not have had any payment made to us at all; but the executors choose themselves to assess the amount, and how can they now recover it back? They chose to assume that a liability which they knew would not ripen into a debt, and cannot recover from us simply because that anticipation has turned out to be fallacious: *Aiken* v. *Short* (2).

Again, the Plaintiff can be in no better position than the official liquidator of the company would be; and it is quite clear that the official liquidator could not compel us, who are creditors of the testator of equal degree with himself, to refund.

[The MASTER OF THE ROLLS referred to *Hodges* v. *Waddington* (3); *Taylor* v. *Taylor* (4).]

The duty of the trustees was to ascertain whether or not their *cestuis que trust* disclaimed. If they had disclaimed before the residue was distributed, the interest of the testator under the settlement might have been sold; and then, instead of being now called on to refund, we should have had a large additional sum paid to us.

Mr. *Bagshawe*, Q.C., and Mr. *Kekewich*, for Mr. and Mrs. *Brackenbury* and the trustees of their settlement, cited *Grayburn* v. *Clark-*

(1) Law Rep. 5 Eq. 99.
(2) 1 H. & N. 210; 25 L. J. (Ex.) 321.
(3) 2 Vent. 360.
(4) Law Rep. 10 Eq. 477.

M. R. 1874 JERVIS v. WOLFERSTAN.

son (1), as shewing it to have been the duty of the executors to sell the testator's interest in the shares.

Mr. *Everitt*, for Mrs. *Jervis*.

Mr. *Southgate*, in reply:—

It is incorrect to say that the trustees of Mrs. *Broughton's* settlement were creditors of the testator. The testator's covenant was to bequeath or otherwise provide; he had a right to choose either alternative; he chose to bequeath, and by so doing satisfied the covenant: *In re Brookman's Trust* (2); and the covenantees are in no better or worse position than any other residuary legatees. That being so, the right of the official liquidator as against them is clear: *Davies* v. *Nicolson* (3); and the Plaintiff is in no worse position than the official liquidator, for the possibility of this liability ripening into a debt was too remote to be considered. Suppose the executors had refused to divide the residue on the ground of this liability, and the residuary legatees had filed a bill to compel them to do so, is it possible to suppose that the Court would not have made a decree against them with costs? Then, as to ascertaining whether or not the *cestuis que trust* accepted the benefits intended to be conferred on them by the deed, a remainderman cannot be called on to accept or disclaim an interest until the interest comes into possession.

SIR G. JESSEL, M.R.:—

This case is one which is by no means common, and which, I hope, will not become common. It is a case where the executors of a will now claim as creditors against the estate which they have themselves distributed; and it is so peculiar that it is necessary to state it shortly.

By a deed of settlement of the 21st of August, 1866, Mr. *Swynfen Jervis*, who was the owner of 625 fully paid-up shares in the *Albert Insurance Company* (then a going concern, and supposed to be not only solvent but wealthy), made a settlement of the shares, which were then supposed to be of great value, on his wife

(1) Law Rep. 3 Ch. 605. (2) Law Rep. 5 Ch. 182.
(3) 2 De G. & J. 693.

for life, with remainder to his children and grandchildren. Mr. *Swynfen Jervis* made his will on the same day, and made the trustees of the settlement his executors. He died in January, 1867, and the will was duly proved.

By an indenture of settlement made in his lifetime, on the 31st of March, 1856, on the marriage of one of his daughters, now Mrs. *Broughton*, Mr. *Swynfen Jervis* had covenanted that he would bequeath by his will, or otherwise provide, that whatever residue of his personal estate should remain at his decease should be equally divided between Mrs. *Broughton*, Mrs. *Brackenbury*, and *Walter Neil Jervis*. By another indenture of the 22nd of April, 1867, which was a settlement of Mrs. *Brackenbury's* share, her one-third share of the residue which she took under Mr. *Jervis's* will was settled, and got into her trustees. The executors of Mr. *Swynfen Jervis*, of whom the Plaintiff is one, advertised for creditors in the usual way. They found that they had paid all their debts, that they had got rid of all their liabilities except this, that there was a possible liability on the *Albert* shares, because, though it was a going concern, and believed to be solvent, it might fail; this failure might take place before the remaindermen had become entitled in possession; they would thus have an opportunity of disclaiming, and this would throw back the shares, as regards beneficial interest or liability, on the testator's estate; and in that way there was a possible liability of the testator's estate to the trustees of that settlement—a remote, contingent, unexpected liability; and it is not contended that the Plaintiff was not aware that there was such a possibility. There being no debt unpaid, and no present liability, the executors divided the residue, which then amounted to £2649 12*s.* 6*d.*, in shares; they paid one share of £883 4*s.* 2*d.* to the trustees of Mrs. *Broughton's* settlement, and another share of equal amount to the trustees of Mrs. *Brackenbury's* settlement. Unfortunately, the payments having been made, the *Insurance Company* failed, and was wound up, and eventually the costs of the liquidation turned out to be exceedingly heavy, and very large calls, amounting to £6875, were made upon these trustees and executors. Of course, as trustees of the settlement and holders of the shares, they were legally liable to pay this large sum of money.

M. R.
1874
JERVIS
v.
WOLFERSTAN.

The *cestuis que trust* under the settlement, with the exception of the widow (who had received some dividends, and was unable to disclaim), naturally disclaimed, and the result, therefore, was, that under our law there was a resulting trust for the testator's estate. Mrs. *Jervis* has paid, or is willing to pay, a sufficient contribution; but the result is that the testator's estate is liable for several thousands of pounds, and liable to indemnify these trustees. I take it to be a general rule that where persons accept a trust at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust; and under that doctrine I shall hold that the estate of the testator became liable to indemnify the trustees against the payment of this large sum of money.

That being so, the next question is, How are they to be recouped, if they are entitled to be recouped at all? The only sums remaining to recoup them are these two sums of £883 4*s.* 2*d.* paid to the trustees of the respective settlements. These sums were originally undoubtedly part of the testator's estate, and part of the estate which was liable to recoup them, and the question which I have now to try is, whether what has happened has entitled these Defendants to retain these moneys, and to leave the trustees to bear the loss personally.

Now, first of all, as regards Mrs. *Broughton* and those claiming under her settlement, it is said that they are not in possession as legatees at all; that it is not a case in which an attempt is made by a creditor to make a residuary legatee refund, but that it is the case of one creditor attempting to make another creditor refund. The first question which I have to examine is, whether that is a true state of the case as regards the law; and I do not think that it is. The covenant by Mr. *Swynfen Jervis* was simply that he would bequeath by will, or otherwise provide, that this share of residue should come to Mrs. *Broughton*. He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the will was to make the lady a residuary legatee, and nothing else, and, consequently, when the trustees of her settlement received it they were simply in the position of a residuary legatee receiving a share of the residue; and if, as residuary legatee, Mrs. *Broughton* was liable to refund, the liability, in my opinion,

remains. That makes the case of Mrs. *Broughton* identical with that of Mrs. *Brackenbury*.

The next question is, Are they liable to refund at all? I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, and I have already held that the Plaintiff and his co-trustee are unpaid creditors.

The only proposition that remains to be examined is this: It is said that, in addition to being creditors, the Plaintiff and his co-trustee were also the executors of the debtor, and that, though creditors can obtain an order to refund against residuary legatees, executors cannot, if the executors have paid over the assets with notice of the debt. Now that is undoubtedly good law, but it does not by any means follow that the creditor, as such, has lost his right to recover, because he could not recover in another character, assuming always that he could not recover in that character. It may be quite true that if the suit was brought in the character of executor only, it would be barred; for that reason I will examine in a moment whether it is so barred; but still I do not think that it is at all conclusive, on the question as to the creditor's right to recover, to say that he has done something which would debar him in another character from recovering, he not suing in that other character.

But, is it true that the executor would be barred in a case like this? I cannot find any authority. I have looked through many cases, and I have asked for the assistance of the Bar, and I cannot find the rule stated in wider terms than these, that he cannot recover from a legatee a payment made with notice of a debt. Now he certainly had not notice of a debt, for the debt did not exist. The utmost notice that he had was notice of a possible liability—a remote, unlikely liability, but a possible one; and the question therefore remains, whether the notice of a possible remote contingent liability of this kind prevents the executor recovering back the assets, if he had paid them away, when that which was formerly this possible remote liability becomes a debt? I am not willing to stretch the rule beyond what its terms require, because it appears to me that great inconvenience would arise from so straining or stretching the rule. If it were true that an executor

M. R. 1874 JERVIS v. WOLFERSTAN.

was disabled from recovering merely because he had notice of such a possible liability, the result would be to throw the great bulk of the estates of testators who had any property into this Court—a result certainly not desirable, because it would then be sufficient for an executor to allege as an excuse for not paying any of the legatees, that at some remote period his testator had been a lessee of property, though the property might be of the greatest possible value, though it had been assigned many years before, and there was a good covenant of indemnity by a solvent purchaser. That is a very common case, indeed. But not only would it be a sufficient ground for refusing to pay a legatee, it would be a sufficient ground for refusing to pay anybody anything. The mere fact that the executor had heard (for that is notice) that the testator had formerly been a lessee, would give him any delay he might wish, because he might say that he was prosecuting inquiries as to whether the testator had ever been a lessee of any leasehold property whatever of which he was formerly possessed.

This shews the extreme inconvenience of notice of such a kind of remote contingent liability being held sufficient to make the executor guilty of negligence (for that is what it must come to) in distributing the assets—guilty of wilful negligence, such as to deprive him of any remedy if he were afterwards made personally liable at the suit of the person entitled to enforce that liability. I think the mere statement of such a result shews how dangerous it would be to extend the doctrine to that length, and I am not prepared so to extend it; on the contrary, I would rather encourage executors to distribute the assets as soon as possible, instead of making them liable to such a responsibility if they did not take such superfluous and unusual precautions. I think, therefore, that it would not have been sufficient to prevent the Plaintiff, even as executor, from recovering this amount if he had been compelled by a third person to pay it. That being so, I am of opinion that the Plaintiff is entitled to recover.

There now remains the question, What is he entitled to recover? I take it that he is entitled to recover what he has paid. It was put to me that that would involve some hardship; but, on the other hand, everybody taking a residue must know that he takes it subject to the testator's liabilities, and takes the risk of its after-

wards turning out that there are undiscovered liabilities. That has always been the law, and I think there is no unusual hardship in that. On the other hand, it has been thought to be a hardship that a man may not spend the income of what he has been paid, and the doctrine is now established, that if an executor recovers back assets he cannot recover any of the income, but he must take only the capital. Following that doctrine, I shall direct the trustees of Mrs. *Brackenbury's* settlement to pay £883 4*s.* 2*d.* into Court, and the trustees of Mrs. *Broughton's* settlement to pay the like sum into Court by a day to be fixed for that purpose.

Then as to the costs, I cannot help seeing that this is a case of very great hardship on all sides. I do not at all blame the trustees of these settlements for bringing this case into Court. Points of law of great nicety, and by no means free from difficulty, have been discussed, and I think that they were not wrong in not making the payments without the case being decided; and so far, therefore, from mulcting them in costs, I think they must have their costs. Therefore, when the sums are brought into Court, I think that the costs of all parties, as between solicitor and client, should be paid out of the fund, and that the residue should be paid to the Plaintiff and his co-trustee, Mr. *Philip Octavius Jervis.*

Solicitors: Messrs. *Stokes, Saunders, & Stokes;* Messrs. *Tucker & Lake;* Messrs. *Few & Co.;* Mr. *J. H. Johnson.*

V.-C. M.

1874

March 13, 14, 16, 17, 18, 19, 21.

HAYMAN *v.* GOVERNORS OF RUGBY SCHOOL.

[1874 H. 42.]

Public Schools Act, 1868 (31 & 32 *Vict.* c. 118)—*Governing Body—Power to dismiss Head Master—Demurrer.*

The Plaintiff, who was appointed head master of *Rugby School* in November, 1869, by the old trustees of the school—the existing governing body—and was dismissed by the new governing body, appointed under the *Public Schools Act*, 1868, in December, 1873, filed his bill against the governing body, alleging that his dismissal was due to the influence of certain members of the governing body who, prior to their election, had shewn hostility to the Plaintiff's appointment, and had formed a scheme to procure its annulment; and praying that the resolution of dismissal might be declared invalid:—

Held, upon demurrer, that the Court was not justified in interfering:

Held, also, that although the Plaintiff was appointed by the old trustees in 1869, the new governing body were not bound by the rules and regulations in force previously to their appointment, but had a power of dismissal unfettered by those restrictions.

Demurrer allowed.

THIS suit was instituted by the Rev. Dr. *Henry Hayman*, the head master of *Rugby School*, against the governing body of that school, and against the Bishop of *Exeter*, to restrain the Defendants from removing or dismissing the Plaintiff from his office of head master, and from electing any person to succeed him in that office, and from instituting any action at law, or other proceedings, for ejecting the Plaintiff from the school-house occupied by him by virtue of his office.

The case came on upon demurrer to the bill for want of equity.

The bill stated that the Plaintiff was appointed head master of *Rugby School* on the 20th of November, 1869, to succeed the Defendant, the Bishop of *Exeter*, then Dr. *Temple*, who resigned the office upon his elevation to the episcopal bench. Both the Plaintiff and Dr. *Temple* received their appointments from the trustees constituted under an Act of Parliament passed in the 17th year of Geo. 3 (c. 71), by which Act the school-house, almshouses, lands, and property then belonging to the said school and charity, were vested in the trustees upon the trusts therein mentioned, and the Act conferred on the trustees the power to sell and grant

leases of portions of the trust property, and contained directions as to the application of the money to arise from such sale, and the rents and profits of the unsold portion of the property; and it was enacted that the trustees should be called "The Trustees of the *Rugby* Charity, founded by *Lawrence Sheriff*, of *London*, Grocer."

The schedule to the Act contained certain rules for the government of the school, and, amongst others, the following:—

That all the masters of the grammar school who shall succeed the present master, shall be chosen within three calendar months next after any vacancy shall happen, by the trustees, or the major part of them, present at a meeting to be held for that purpose, and be removable at the will and pleasure of the trustees, or a major part of them, present at their meeting on the first Tuesday in the month of August. By a subsequent Act of 54 Geo. 3, c. 131, the annual day for the meeting of the trustees was altered from the first Tuesday in August to the third Tuesday in July.

By the *Public Schools Act*, 1868 (31 & 22 Vict. c. 118), which applied, amongst others, to *Rugby School*, it was enacted that "existing governing body" should, in the case of *Rugby*, mean "the trustees," and power was given to the then existing governing body of each of the schools to which the Act applied to make, within a certain time, a statute for establishing the constitution of the governing body in each school as might be deemed expedient, in default of which the powers of making statutes were to pass to special commissioners mentioned in the Act. No statute was in fact made for establishing the new governing body until May, 1871, when a statute was made for that purpose by the special commissioners mentioned in the *Public Schools Act*, 1868.

In November, 1869, Dr. *Temple*, then head master of *Rugby*, sent in his resignation, to take effect from Christmas, 1869.

The Plaintiff was then head master of *Bradfield College*, to which he had been appointed in 1868. Upon Dr. *Temple's* resignation, the trustees advertised for candidates, and the Plaintiff, among others, sent in his application, accompanied by testimonials which, with the exception of one from the late Professor *Connington*, which was not dated, and one from Dr. *Holden*, head master of *Ipswich School*, which was dated September 11, without specify-

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

ing the year, all bore the actual date on which they were given to the Plaintiff.

The bill then stated as follows:—

"There were several other candidates for the office besides the Plaintiff, and they also sent in testimonials to the trustees, and the trustees, after considering all the testimonials and claims of the candidates, came to the conclusion that the Plaintiff was the fittest person to be head master of the school, and appointed him accordingly. Among the rival candidates were some who had been educated at or were otherwise connected with *Rugby*, and whose claims were favoured by Dr. *Temple* and by the assistant masters then working under him at *Rugby*, and by Dr. *Bradley*, who had himself formerly been an assistant master at the school, but was then head master of *Marlborough College;* and it appears, from the circumstances hereinafter stated, to have been the opinion of Dr. *Temple*, Dr. *Bradley*, and the assistant masters, that the trustees were bound to select from among the candidates some candidate who had been educated at or was otherwise connected with *Rugby School*, or, at all events, some candidate other than the Plaintiff. The Plaintiff was not educated at, and had no connection with, *Rugby School*, and Dr. *Temple*, Dr. *Bradley*, and the assistant masters were accordingly much piqued and annoyed at the choice which the trustees had made, and being much prejudiced against the Plaintiff on religious and political or other grounds, they deliberately formed a scheme and design of procuring by every means in their power the annulment of the said appointment, or otherwise of so harassing and thwarting the Plaintiff in relation to the school and to themselves, and so disparaging him in the eyes of the public as to make his position as head master intolerable, and so, if possible, compel him to resign. A part of such scheme and design was to procure, if possible, some resolution or resolutions of the governing body censuring or reflecting on the conduct of the Plaintiff, and by publishing the same in the public newspapers to prejudice the parents of pupils and intending pupils, and the boys themselves, and the public generally, against the Plaintiff, so as to make it difficult, if not impossible, for him to maintain the numbers and discipline of the school. Immediately upon the Plaintiff's appointment, Dr. *Temple*, Dr. *Bradley*,

and the said assistant masters proceeded to execute the said design, and from that time to the present have not ceased in their endeavours to carry the same into effect; and, in fact, the acts and proceedings hereinafter mentioned on the part of Dr. *Temple* and Dr. *Bradley*, and of the governing body after they became members thereof, so far as such acts and proceedings were hostile to the Plaintiff, were done, or procured to be done, in furtherance of the same settled plan and design—viz., either to procure the dismissal of the Plaintiff, or to force him to resign the head mastership."

There were twenty-one assistant masters under Dr. *Temple*, all of whom, with the exception of Mr. *Burrows*, a private friend of the Plaintiff, were unanimous in support of Dr. *Temple* and Dr. *Bradley*, and in opposition to the Plaintiff. Of the assistant masters, seven besides Mr. *Burrows*, and including Mr. *Scott*, were foundation fellows, the others received and held their offices from the head master. The head master and six of the assistant masters were also house masters, and most of the house masters were also house tutors. In the head master's house there were at the date of the Plaintiff's election two house tutors, viz., Mr. *Scott* and Mr. *Robertson*, who had not houses of their own, but filled the positions of house tutors in the school house. The bill then stated the nature of the duties of house tutors, which necessarily placed them in confidential relation both with the boys and their parents, and set out a copy of the resolution of the trustees appointing the Plaintiff, which was passed at a meeting of the trustees at which Lord *Charles Percy*, Lord *Leigh*, Sir *C. B. Adderley*, Mr. *Newdegate*, Mr. *Davenport*, the Rev. Mr. *Holbech*, and Colonel *North* were present. Within ten days after his appointment the Plaintiff received a letter of remonstrance, signed by the twenty assistant masters above referred to. This letter was brought to the Plaintiff by Mr. *Potts*, one of the number, who, in conversation, said, "You come among us as a High Churchman and a Conservative." The Plaintiff inquired his authority for that statement, and was answered, "The newspapers," the speaker adding that the traditions of *Rugby* were distinctly Liberal. The letter was to the following effect:—

It stated that they felt grief and anxiety at some of the facts connected with the Plaintiff's election as head master; that his

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

candidature had violated some of the most cherished traditions of the place; that he had not received testimonials from those who had been lovers of the school away from *Rugby;* that all previous head masters had been helped by the recommendations of men who had known and loved the school, and had thus been surrounded by an atmosphere of affection and confidence; that there was an absence of testimony in the Plaintiff's favour from his own former pupils and masters, and that any one who was content to dispense with such recommendation took a lower view than his predecessors had done of what was due to the character of the school. They complained bitterly of the Plaintiff having used testimonials which had been given for other schools dissimilar in character without fresh permission of the writers, and that they did not express the Plaintiff's fitness to be head master of *Rugby;* and that some of the writers who had been applied to had expressed a feeling quite the reverse of gratification at the result of their employment. That every previous head master had been loudly and heartily recommended by his troop of friends; and that the position of the school had already been imperilled by his departure from established customs.

To this letter the Plaintiff returned no answer; but, being at *Rugby* for three days in the month of December following, he addressed the assistant masters orally, and expressed a hope that after what he had said he and they might all work together for the good of the school, adding: "If any one feels that he cannot work cordially with me, I hope he will let me know in time, that the interests of the school may not suffer."

During such stay of the Plaintiff at *Rugby* he was the guest of Dr. *Temple*, for the purpose of deriving information concerning his future duties. In the course of conversation Dr. *Temple* told the Plaintiff that he thought the assistant masters were justified in the course which they had taken, and that he had formed the opinion that the Plaintiff was not qualified for the post of head master, and that he intended to communicate that opinion to the trustees.

The bill then set out a letter addressed by Dr. *Temple* to the trustees of *Rugby School*, in which he stated his approval of the course taken by the assistant masters, and said that after seeing the Plaintiff for three days he had formed an opinion that he was

quite incompetent to perform some of the most important duties of the place. It was true that he had taken a double second class at *Oxford*, and his friends spoke of him as possessing considerable ability. He, no doubt, had the ability implied in a clear perception of his own purposes, much power of expression, and extraordinary strength of will; but in that true insight into character which alone would enable a man to deal justly with the older boys, or to govern able and high-minded men, he was absolutely deficient. The writer laid much stress upon the fact that the Plaintiff had used testimonials for his candidature which had been given him for other schools, and called upon the trustees to require Dr. *Hayman* to account for the use he had made of such testimonials.

The twenty masters who had previously addressed Dr. *Hayman* then forwarded a memorial to the trustees complaining of the Plaintiff's use of the before-mentioned testimonials, and Dr. *Bradley*, who had formerly been an assistant master at *Rugby*, sent letters to the trustees containing similar complaints to those set out in the memorial of the masters, and complaining in particular of the use of a testimonial written by himself in 1866.

Immediately afterwards, and on the day before the meeting of the trustees to consider the propriety of Dr. *Hayman's* conduct, the said Dr. *Bradley* addressed a letter to the *Times*, which was published on the 20th of December, 1869, referring to the course he had taken in regard to this testimonial.

Whilst the said letters and testimonials were still under consideration the assistant masters applied to the trustees to hear Dr. *Temple* orally on their behalf, and Dr. *Temple* expressed his willingness to be heard as the spokesman of the assistant masters. The trustees, however, declined to accede to this request, and having held a meeting on the 20th of December, 1869, they adopted the following resolution:—"The trustees having fully considered the matter referred to them by Dr. *Temple* and the assistant masters of *Rugby*, Mr. *Hayman's* reply, and other letters subsequently received from those who had given testimonials of a former date, to Mr. *Hayman*, are unanimously agreed that Mr. *Hayman* has acted with perfect good faith in the use made by him of the testimonials laid before the trustees. Ordered, that a copy

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

of the above minute be forwarded to Dr. *Temple* and to the assistant masters."

The attitude of the assistant masters, and especially of the two house tutors, Mr. *Scott* and Mr. *Robertson*, continuing to be hostile to the Plaintiff, he, on the 10th of November, 1870, addressed a letter to the trustees, setting forth the difficulties he was under in having to contend with the opposition of these gentlemen, and stating that he proposed to change the two house masters for two more sympathetic colleagues, and to give them notice that he should not require their services after three months. The course proposed by Dr. *Hayman* was fully approved of by the trustees, and the two masters received their dismissal; but inasmuch as Mr. *Scott* was one of the foundation masters, it was necessary that his dismissal should be effected by the trustees themselves.

On the 25th of March, 1871, the trustees passed a resolution dismissing Mr. *Scott* from his mastership. But such resolution was reconsidered at a subsequent meeting held on the 30th of March, and rescinded on the ground that they could only pass a resolution of dismissal at their annual meeting in July.

The statute constituting the new governing body of *Rugby School* was approved by Her Majesty in Council in August, 1871, and in December, 1871 the new governing body was fully constituted. The Defendants—The Bishop of *Worcester* (chairman), The Bishop of *Exeter*, Dr. *Temple* (deputy chairman), the Marquis of *Hertford*, the Earl of *Warwick*, Lord *Leigh*, Sir *Charles Bowyer Adderley*, *Charles Newdegate*, Esq., Dr. *Bradley*, the Rev. Dr. *Bateson*, *Henry J. S. Smith*, Esq., *George K. Richards*, Esq., and *Ralph R. W. Singer*, Esq.—formed the new governing body.

The 41st paragraph of the bill was as follows:—

"Although Dr. *Temple* and Dr. *Bradley* had been active partisans of the assistant masters in their differences with the Plaintiff, and had in fact prejudged the whole case against the Plaintiff, and were determined beforehand to drive him from the school, yet they allowed themselves to be elected members of the new governing body, and thus to become judges of matters in and respecting which they and the assistant masters whose cause they had taken up, and whom they in fact represented, had a strong personal interest and bias, which made them wholly unfit to form an

impartial judgment on such matters, or on any question between the assistant masters and the Plaintiff. Dr. *Temple* had been head master of the school for several years, and was the brother-in-law of one of the assistant masters. Dr. *Bradley* had been an assistant master of the school for many years, and was likewise closely connected by marriage with one of the assistant masters. Both Dr. *Temple* and Dr. *Bradley* were, from their personal experience and from their connection with the assistant masters, intimately acquainted with the affairs of the school both past and present, and they were, in fact, looked to by their colleagues on the governing body, and trusted implicitly by them as the proper and trustworthy sources of information on all matters connected with the school. Dr. *Temple* abused the power and influence over his colleagues which his long experience and ample means of knowledge gave him to further the aforesaid scheme and design of himself and the assistant masters, and made incorrect representations to his colleagues as to several matters of fact, and more particularly as to what were the established customs and usages of the school, and represented as part of such established customs and usages several matters which were not part thereof, but were in fact innovations introduced by Dr. *Temple* himself; and the acts and proceedings of the new governing body, so far as they were hostile to the Plaintiff, and especially the resolutions hereinafter complained of, were in fact caused and brought about, in whole or in part, by such abuse of power and influence, and such incorrect representations, as aforesaid."

The bill further stated as follows:—

Towards the end of the year 1871 Mr. *Burrows*, who then held one of the boarding houses, gave notice of his resignation, and in January, 1871, the Plaintiff appointed Mr. *Green* to the vacant house. In consequence of this appointment a letter of remonstrance was sent to the Plaintiff by ten of the assistant masters, who were senior to Mr. *Green*, protesting against any infringement of the rule of seniority which had always been adopted at *Rugby* in the appointment of a master to a boarding house, and they also addressed a letter with the same complaint to the governing body, who declined to interfere with the appointment of Mr. *Green* on the ground that the new rules and regulations for the manage-

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

ment of the school had not yet been framed; but at the same time they refrained from expressing any approval of the exercise of the head master's discretion in this particular instance.

Five of the governing body, including Dr. *Temple* and Dr. *Bradley*, had been desirous that a resolution should be passed requiring the Plaintiff to rescind his appointment of Mr. *Green* to the boarding house, and they all signed a statement of their reasons for holding that opinion, which was addressed to the other members of the governing body.

The bill then stated circumstances which had caused a difference between the Plaintiff and the governing body with reference to Mr. *Scott*, who had still retained his position as master in the school, but without being tutor of pupils. It appeared that Mr. *Scott* had requested the Plaintiff to give him liberty to take pupils; but in consequence of circumstances which had come to the Plaintiff's knowledge, but which were not explained in the bill, the Plaintiff refused this request. Mr. *Scott* then appealed to the governing body, and they disapproved of the Plaintiff's conduct, and expressed an opinion that Mr. *Scott* ought to be restored to the capacity to take pupils, and that the charges made against Mr. *Scott* ought to be retracted by the Plaintiff. The Plaintiff, out of consideration for the governing body, reinstated Mr. *Scott* and withdrew the charges he had made against him, and also apologised in the most ample manner for having brought forward charges which he was unable to substantiate. Mr. *Scott*, however, being still dissatisfied, and thinking the apology insufficient, again appealed to the governing body, who passed a resolution that the Plaintiff's letter to Dr. *Scott* was satisfactory, but they regretted that it had been delayed until it had lost its value, and they further stated that they felt it their duty to consider the question whether Dr. *Hayman* should not be recommended to retire from the head mastership.

The 88th paragraph of the bill then stated that the governing body, under the influence of Dr. *Temple* and Mr. *Bradley*, who were personally hostile to the Plaintiff on the ground of his having been elected by the trustees, in preference to the other candidates, to the office of head master, and who had determined, for that reason, to use every means in their power to undo that appointment, and to

force the resignation or dismissal of the Plaintiff, had, in fact, been persuaded, and had resolved beforehand, to get rid of the Plaintiff, whatever he might write to Mr. *Scott*, and whatever explanation or statement he might make to the governing body.

Then followed a statement as to another cause of difference between the Plaintiff and the governing body.

The new regulations for the school, framed in pursuance of the *Public Schools Act*, 1868, were under discussion by the governing body, and were intended to come into operation at Christmas, 1873; and in pursuance to these regulations it would have become necessary, in consequence of the falling off in the numbers of boys, that two of the masters should be dismissed, and the Plaintiff thereupon gave notice to Mr. *Sidgwick* that his services would not any longer be required. Mr. *Sidgwick* was the only one of the assistant classical masters who was unmarried, and was selected by the Plaintiff for dismissal on that account. The Plaintiff also gave notice of dismissal to Mr. *Smith*, the fifth master in mathematics and natural science. Thereupon fourteen of the assistant masters addressed a letter to the Plaintiff, complaining that he had departed from the customs and usages of the school in dismissing senior instead of junior masters. The assistant masters also addressed a remonstrance to the governing body against the Plaintiff's conduct, and various communications took place between them upon the subject, when the governing body expressed their opinion that the Plaintiff had bound himself by a letter to the chairman, dated the 16th of April, 1872, to adhere to the customs and usages of the school, and that one of such customs was to dismiss the junior masters in case it became necessary to reduce the number of masters.

The 114th paragraph then charged that the governing body were well aware, as early as February, 1872, that the Plaintiff wholly repudiated and refused to be bound by any engagements voluntarily entered into by Dr. *Temple*, which were founded on no existing statute or regulation, and which interfered with the authority vested in the head master, and they knew therefore that his undertaking of the 16th of April, 1872, was not intended to be, and was not in fact, an undertaking to observe any such alleged custom. Nevertheless they, acting under the hostile and im-

V.-C. M. 1874 ~~ HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

proper influence aforesaid, accepted the unsupported and incorrect statement made to them by Dr. *Temple*, that the said alleged scheme of retirement was one of the customs and usages of the school, and the further statement of Dr. *Temple* (which was wholly contrary to the fact), that the existence of such scheme of retirement had been made known to the Plaintiff by Dr. *Temple;* and in fact, in passing the resolutions, the governing body improperly, and in derogation of the trust reposed in them, abdicated their proper functions and duties as governors and trustees of the school, and surrendered their judgment to Dr. *Temple* and Dr. *Bradley*, and allowed them, and especially Dr. *Temple*, to be at once witnesses of facts in dispute between the assistant masters and the Plaintiff, and which were vital to the determination of the questions at issue, and judges of the Plaintiff's conduct, and other issues depending upon such disputed facts, although Dr. *Temple* and Dr. *Bradley* had from the beginning been advocates and partisans of the Plaintiffs' opponents in the school, and had pledged themselves to condemn, and had in fact condemned, the Plaintiff, and recorded an adverse judgment against him, before they became members of the governing body.

On the 19th of November, 1873, the governing body held a meeting, at which the following resolution was passed:—"That in the opinion of the governing body, Dr. *Hayman*, in giving notice of dismissal to Mr. *Sidgwick* and Mr. *Smith*, has not acted in accordance with the undertaking given by him to observe the usages and customs of the school. That the governing body feel that, under existing circumstances, they must give effect to the intimation conveyed to Dr. *Hayman* in the chairman's letter of February 25, 1873; they accordingly require him to place his resignation in the hands of the clerks on or before Wednesday, December 23, to take effect at Easter next."

The Plaintiff then addressed a letter to the governing body, requesting to be allowed to adduce further evidence as to the usages and customs of the school; but the governing body, on the 10th of December, again repeated their request that Dr. *Hayman* would give in his resignation.

To this communication Dr. *Hayman* stated that, having a conscience clear of any act unbecoming a gentleman and a head

master, he must respectfully decline to comply with the request that he should place his resignation in the hands of the clerks. He also requested that the papers which he enclosed might be read and considered, as a matter of justice to himself.

On the 19th of December, 1873, the governing body having again met to consider the Plaintiff's letter, passed this resolution :— "That upon a review of the administration of the school from the period when the governing body came into office to the present time, they are of opinion that Dr. *Hayman* is not a fit and proper person to hold the position of head master of *Rugby School*, and that it is essential for the interests of the school that he should cease to hold that office. That, in exercise of the powers vested in the governing body by the *Public Schools Act*, 1868, Dr. *Hayman* be removed from his office of head master, and that such removal take effect on the 7th day of April next. That the clerk be instructed to communicate the above resolution to Dr. *Hayman*, and to give him formal notice to vacate his office of head master of *Rugby School* on the 7th day of April next."

On the following day Dr. *Hayman* received this letter from the chairman, the Bishop of *Worcester* :—

"My dear Dr. *Hayman*,—The terms of the resolution passed by the governing body yesterday will have informed you that the step which they have taken is not based simply on the matter of the dismissal of Mr. *Sidgwick* and Mr. *Smith*. I cannot tell you how much pain and grief the occurrences of the last two years at *Rugby* have caused me.

"Yours very truly,
"*H. Worcester*."

In consequence of the above resolution the Earl of *Warwick* resigned his seat on the governing body.

Dr. *Hayman* still protested against the proceedings of the governing body, and further correspondence took place on the subject.

The bill then stated that, in pursuance of the powers given to the governing body by the *Public Schools Act*, 1872, a scheme was entered into between the governing body and the old trustees, and was afterwards sanctioned by Her Majesty in Council, by which the school-house, with the lands, buildings, and appurtenances belong-

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

ing thereto were vested in the Defendants, the governing body, as trustees, for the use of the school.

The bill also stated that on the 15th of January, 1874, the Defendants issued this notice to the Plaintiff: "Whereas we, the governing body of *Rugby School*, for divers reasons us hereunto moving, deem it expedient, in the interest of the said school, that you should be removed from the office of head master thereof: Now, therefore, we, the said governing body of the said school, in pursuance of the power and authority vested in us by the *Public Schools Act*, 1868, and all other powers and authorities enabling us in this behalf, do hereby dismiss you from your office of head master of the said school; and do hereby direct that such dismissal shall take effect as and from the 7th of April next, on which day we require you to deliver up to our clerks, or to one of them on our behalf, the possession of the school-house, land, buildings, and appurtenances belonging thereto, and the goods, chattels, and effects belonging to us in the said school-house and buildings, and which you now hold by virtue of your said office of head master of the said school."

The 135th paragraph of the bill was in the following terms:—

"Under the circumstances herein appearing, the resolutions and proceedings of the governing body herein complained of were passed, not in the due exercise of the powers and trusts reposed in them, nor out of regard for the true interests of the school and the public, but out of a predetermined hostility, and motives of resentment and party spirit on the part of Dr. *Temple* and Dr. *Bradley*, and the assistant masters whom they represented, and out of the exercise by Dr. *Temple*, by the means aforesaid, of an undue influence over the other members of the governing body, and the undue and culpable submission on the part of the other members of the governing body to such undue influence, and out of an undue bias and prejudice on the part of the governing body in favour of the assistant masters and against the Plaintiff, resulting in a great measure from misrepresentations of the Plaintiff's acts and motives by the Defendant Dr. *Temple*, and an entire want of fairness and impartiality on their part in adjudicating on the charges made by Dr. *Temple* and the assistant masters against the Plaintiff, and, in fact, out of motives which, according to the rules

of equity, were improper and corrupt. Under these circumstances the Plaintiff submits that the said resolutions and proceedings are as against the Plaintiff invalid, and ought not to be enforced."

The Plaintiff also submitted that the resolutions of the 19th of December, 1873, were invalid on this further ground, that, inasmuch as he was elected to the office of head master under the provision of the statute 17 Geo. 3, c. 71, as modified by the statute 54 Geo. 3, c. 131, he could be dismissed only in accordance with the terms of those statutes at an annual meeting of the trustees held pursuant thereto.

The bill prayed that it might be declared that the resolutions of the 19th of December, 1873, and the subsequent notice of the 14th of January, 1874, were respectively invalid and not binding on the Plaintiff, and ought not to be enforced:

That the Defendants, the governing body, might be restrained by injunction from removing or dismissing the Plaintiff from his office of head master, and from electing any person to succeed the Plaintiff in his office, and from instituting or prosecuting any action at law or other proceedings for ejecting the Plaintiff from the school-house and premises occupied by him in virtue of his office, or from otherwise enforcing or carrying into effect the said resolutions and notice, or either of them.

Mr. *Cotton*, Q.C., Mr. *Davey*, Mr. *C. Bowen*, and Mr. *Ilbert*, in support of the demurrer:—

The object of this bill is to set aside the resolution come to by the governing body of *Rugby School* removing Dr. *Hayman*, the head master, from his office, and two grounds are stated in support of the prayer, one being that the meeting of the governing body was not held in the manner prescribed by the rules governing their meetings, and the other that, under the circumstances stated in the bill, the resolution passed by the governing body was invalid.

Taking the first of these grounds, it will be seen by the bill that the old trustees of *Rugby School* obtained their powers under the Act of 17 Geo. 3, c. 71, and the rules for their guidance are that the head master then appointed to the school should be continued in his office so long as he should behave well, and that all head masters who should succeed him should be chosen within three

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

months after any vacancy should happen, by the trustees, at a meeting to be held for that purpose, and be removeable at the will and pleasure of the trustees, or a major part of them, present at their meeting on the first Tuesday in August. The day for the annual meeting was altered by a subsequent Act to the third Tuesday in July. Then, by the *Public Schools Act*, 1864 (27 & 28 Vict. c. 92), it is enacted that every person appointed after the passing of that Act to any office in the governing body of any of the schools should take and hold that office subject to such provisions and regulations as should be thereafter enacted respecting the same; and it is provided that the governing body should mean and include the head master. Dr. *Hayman's* appointment was, therefore, subject to the provisions of the Act of 1868 (31 & 32 Vict. c. 118). By that Act the head master is to hold his office at the pleasure of the new governing body, and no reference is there made to any particular period for holding the meetings. Dr. *Hayman* was appointed by the old trustees, but his removal has been effected by the new governing body, who were appointed in 1871, and took their powers, not from the rules and regulations of the Act of Geo. 3, but from the Act of 1868, and their right to dismiss the head master is not fettered by any provisions as to the day of holding the meetings.

Our contention is that this is a matter in which the Court cannot interfere. The 13th section of the *Public Schools Act* provides that the head master of every school to which the Act applies shall be appointed by and hold his office at the pleasure of the new governing body, and that all other masters shall be appointed by and hold their offices at the pleasure of the head master. The powers to be exercised by the governing body are extensive, but they are well defined. In the dismissal of a master they are not to be subject to any control whatever, unless the interference of Parliament should become necessary. They may exercise their pleasure as they think fit; they are not bound to give any reasons for their conduct, but have to consider only what they think best for the interests of the school. There may be a variety of reasons for dismissing a head master which it would be impossible, and possibly impolitic, to disclose. Some one must have the power, and the Legislature has thought fit to entrust it to the governing

body, who are men selected by various influential bodies, and the names of the gentlemen forming this governing body are sufficient to shew that they are the best calculated to exercise justly and fairly the powers entrusted to them.

These gentlemen are not trustees who can be brought within the jurisdiction of this Court. The old trustees of the *Rugby* charity had vested in them the property belonging to the school, such as the school-house and the lands and tenements belonging to the charity, but this property was held by them distinct from the powers as to the management of the school. By the *Public Schools Act* the old trustees were constituted the existing governing body until a new governing body should be appointed, and the Act gives to the new governing body powers as to the control of the school quite separate and apart from the possession of the property, which was not by that Act vested in them. By a later statute, the *Public Schools Act*, 1872, power was given to the governing body to prepare a scheme for crrrying into effect an arrangement with the old trustees as to the vesting of the property, and an arrangement with this object was entered into and approved by Her Majesty in Council, for vesting the school-house and the property of the charity in the governing body as trustees for the use of the school; but this does not interfere with the powers possessed by the governing body as to the management of the school.

Neither are the governing body in the position of judges whose decisions would be subject to appeal, or who might be incapacitated from exercising their functions by reason of their having an interest in the matter in dispute. The governing body are constituted, by the Act of Parliament, the sole managers of the school. They are subject to no control, and have a statutory power independent of any authority.

Upon what ground, then, is this bill filed, and what is the Court asked to act upon? It is charged that, under the circumstances set forth in the bill, the resolutions and proceedings of the governing body were adopted, not out of regard to the true interests of the school, but out of a predetermined hostility and motives of resentment and party spirit on the part of two members of the governing body, Dr. *Temple* and Dr. *Bradley*, and the assistant masters whom

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

they represented, and out of the exercise by Dr. *Temple* of an undue influence over the other members of the governing body, and the undue and culpable submission on their part to such undue influence, and out of an undue bias and prejudice on the part of the governing body against the Plaintiff, resulting from misrepresentations of the Plaintiff's acts by Dr. *Temple*, and an entire want of fairness and impartiality in adjudicating on the charges made by Dr. *Temple* and the assistant masters, and out of motives which, according to the rules of equity, were improper and corrupt. It is also alleged that a scheme was formed by Dr. *Temple* and Dr. *Bradley* for getting rid of the Plaintiff, but there is no allegation that, if there was such a scheme, it was ever known by the governing body, or that they lent themselves to it. The only foundation for these charges is that Dr. *Temple* and Dr. *Bradley* considered at first that the appointment of Dr. *Hayman* as head master was an unwise appointment. No doubt they were of that opinion, and from their long connection with the school there was no one better able to form an opinion upon the subject. When they became members of the governing body they, no doubt, expressed their views, and gave their colleagues the benefit of their experience; and that they exercised a due and proper influence among the governing body is nothing more than might be expected; but to suppose that two gentlemen only—and it is not alleged that any others were implicated in the scheme—should have been able to overwhelm and override the opinions of ten such men as those who formed the governing body, is quite unworthy of belief. There is no allegation of fact to support the idea. It is the mere colour put upon the circumstances by the pleader. It is true that upon demurrer the Defendants must, for the purpose of the argument, admit the facts stated to be true, however capable they may be of contradiction; but we do not upon demurrer admit the pleader's colour put upon those facts. We admit that there are certain grounds upon which a Court of Equity might interfere, such as fraud, or corrupt objects sought to be attained, but there is no fact alleged on this bill which could form a ground for the interference of the Court. The only passages in the bill introduced by way of founding an equity are those in which the pleader has put his own colour on the facts alleged. If there had been an

allegation of personal benefit to be gained by the governing body, it might have introduced an equity, but there is no such allegation, and could not be. The charge of undue and culpable submission to the influence of two members of the body is not a fact to be admitted on demurrer, but a mere colour given to what is alleged. This Court has no means of judging whether Dr. *Temple* exercised any or what influence over the other members of the governing body.

These are mere general charges which are not sustained by facts, and are not sufficient to support the bill. It was held in *Munday* v. *Knight* (1) that if there be no definite or specific charge of fraud, a vague charge would not sustain the bill upon demurrer. So in *Gilbert* v. *Lewis* (2) there were allegations in various forms to the effect that certain deeds were the result of a fraudulent contrivance, and were fraudulently obtained; but the circumstances constituting that fraud were nowhere stated, and the Lord Chancellor said it was not sufficient to allege that a deed had been obtained by fraud unless the acts constituting the fraud were stated on the face of the bill.

It is the same in principle where there is a general allegation that property is held in trust, as in *Grenville-Murray* v. *Earl of Clarendon* (3); and it was there held that that would not protect a bill from demurrer for want of equity.

So here, the general charges can only be held as admitted by the demurrer when they are supported by particular charges; and all that the charges amount to is, that the ten members of the governing body listened to the suggestions of the other two, who were much better able to form an opinion than they themselves were.

No cases can be cited in which the Court has ever interfered where a power has been given to do an act at the will and pleasure of the persons having the power. The only right this Court could have would be in a case where it could be said that the act was so absolutely fraudulent that it must be considered void, and then only upon evidence on which a Court of Law would be bound to grant a mandamus. One of the strongest cases is that of

(1) 3 Hare, 497. (2) 1 D. J. & S. 38.
(3) Law Rep. 9 Eq. 11.

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

Reg. v. *Governors of Darlington School* (1). In that case the governing body of *Darlington School* had the power of dismissing the master "in the exercise of their sound discretion." There were certain specific charges alleged against the master which at the trial in the first instance were disproved. The finding on all points was against the governing body, but nevertheless the Court of Queen's Bench directed a verdict to be entered for the governing body, on the ground that they had the power, "in the exercise of their sound discretion," to remove the master. That judgment was affirmed by the Court of Exchequer Chamber, where it was held that the master had not even the right to be heard in explanation of the charges brought against him. Their right to dismiss him was not to be restricted by any opinion which the Court might form of the reasons on which they might have been induced to exert their power. In this case Dr. *Hayman* had the fullest opportunity of being heard and of defending himself against the charges brought against him. It was not on account of one act, but many acts, which were seriously disapproved of by the governing body. If there could be any case in which the governing body might not be justified in removing a master, it is not such a case as is made by this bill, and this is not the Court in which there can be any jurisdiction to interfere with the pleasure of the governing body. If they are wrong, let Parliament interfere and depose them from their office; but while they hold the office, it is for them alone to exercise their discretion. Cases may be cited in which the acts of bodies resembling this governing body have been interfered with by the Court where pecuniary interest has been shewn to have existed, or where corrupt motives have been evident, but no other reasons will hold good.

In the case of *Dummer* v. *Corporation of Chippenham* (2) the governing body, who were the trustees of the school, dismissed a master on the alleged ground of bodily disease and infirmity of age; but the bill alleged that the specific act for which the master was dismissed was really that he had given a vote for a member of Parliament contrary to the views entertained by the trustees of the school. The fact alleged there had nothing to do with the administration of the school, and was therefore not within the

(1) 6 Q. B. 682. (2) 14 Ves. 245.

powers of the trustees. It was a corrupt motive to influence a vote; and it was because the Defendants were trustees that the application was made to the Court. Lord *Eldon* overruled the demurrer, saying it was a case in which the Court must call upon the Defendant for an answer.

Willis v. *Childe* (1) was the case of a school founded by *Edward* VI., and the Corporation of *Ludlow* were the trustees who had authority, in the execution of the powers and trusts reposed in them, to remove the master and ushers from their offices, provided that the removal and the grounds for such removal were entered in the books of the trustees as therein directed. The Master of the Rolls held, that as trustees the Court could exercise its power over them for neglect, misbehaviour, or any just cause, in the execution of the powers and trusts reposed in them.

Here we say the governing body are not exercising their power as trustees, but are simply acting as managers of the school. The resolution come to by them is, that in the opinion of the governing body Dr. *Hayman* is not a proper person to be head master. Whether they were right or whether they were wrong in this opinion is not to be decided upon by this Court. There are certain facts stated, having reference to the conduct of Dr. *Hayman* in three separate cases—those of Mr. *Green*, Mr. *Scott*, and Messrs. *Sidgwick* and *Smith*; and it is evident that during Dr. *Hayman's* time the school has been reduced in numbers. In fact, the circumstances shew plainly that for the well being of the school it was necessary either that Dr. *Hayman* or the whole of the masters should be dismissed; and the governing body, having taken into consideration all the facts connected with Dr. *Hayman's* management of the school during the period of his holding the office of head master, and after having on three several occasions warned him of the consequence of that conduct, came at length to the determination that the only course left for them to adopt in order to save the school from the consequences of these dissensions, was to remove Dr. *Hayman* from his office.

There is no denial by Dr. *Hayman* of the right of the governing body to dismiss him for good cause, and the governing body never

(1) 13 Beav. 117.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

denied the right of the head master to dismiss his under masters, but they have the power of shewing their disapproval of Dr. *Hayman's* mode of exercising his power by dismissing him in his turn. The well-being of the school depends upon the observance of the old customs of the school, and the most important of those customs is the advancement of the assistant masters by seniority to the higher positions and emoluments of the school; and these customs have been broken down by Dr. *Hayman*, and it is for the governing body to form their opinion whether he was justified in the course pursued by him. They could not prevent him from exercising the power of dismissal given him by the Act of Parliament, but they can prevent him from repeating the acts they disapprove of by dismissing him, and they have done so under the statutory power given them by the *Public Schools Act*.

Mr. *Glasse*, Q.C., in support of the bill:—

The first point we rely upon in support of this bill is, that the Plaintiff was not liable to be dismissed by the new governing body but that he could only be dismissed by the old trustees, or at any rate, if dismissed by the present governing body, they had no right to exercise the power except at the annual meeting to be held in July, under the regulations of the school, as laid down in the Act of 17 Geo. 3, c. 71. The 28th section of the *Public Schools Act* of 1868 enacted that, subject to any alteration made by that Act, all powers vested in the then existing governing body should continue in force and might be exercised by such governing body until a new governing body should be appointed, and then by such new governing body, "in the same manner in which they might have been exercised if that Act had not passed." There have been no new regulations made, and the old ones therefore continue in force. The passing of these resolutions of dismissal at a meeting not held in July was *ultrà vires*. Dr. *Hayman* was not appointed by the new governing body, but by the old trustees. At the time of the passing of the Act of 1868 the trustees were amenable to this Court, and the new governing body have no power over Dr. *Hayman*, except so far as the mantle of the old trustees has fallen upon them. The 13th section of the Act of 1868 gave the new governing body power over any head master "who shall be appointed;" but Dr.

Hayman had already been appointed, and if they could dismiss him at all, they could only do so under the powers they derived under the old Act. And by the scheme carried out in pursuance of the *Public Schools Act* of 1872 the property of the charity has been actually vested in the Defendants, the governing body, as trustees.

The argument in support of the demurrer has been that the governing body of *Rugby School* are not amenable to the jurisdiction of this Court, though they would be amenable to the High Court of Parliament. Our contention is that upon the authorities they are fully amenable to the Court of Chancery.

It has been admitted that there is one exception—that is, in case the actions of the governing body are tainted with corruption, and it has been attempted to narrow the meaning of the term corruption to pecuniary interest or to electioneering purposes. But corruption has a much larger meaning, and it signifies the being tainted by animus and unfair bias. This animus is charged against Dr. *Temple* and Dr. *Bradley*, and the leaven of those two members has tainted the whole of the governing body. It has been held that the exercise of discretion is a matter which this Court will inquire into. The *Darlington School* case has been cited as a contrary authority, but that case was distinctly disapproved of by Lord *Hatherley* in the case of *Dean* v. *Bennett* (1). Assuming, however, that it is good law, the observation of Lord *Denman* in *Reg.* v. *Darlington School* goes to support our case, where he says (2), "The prosecutor has denied the charges and the trials; but he does not deny the exercise of discretion which might have been disproved in fact, as by shewing that malicious feelings against the master were indulged in by the governors, or that they had some interest to serve in promoting another to his place." The statements in this bill go to shew such malice on the part of Dr. *Temple* as would have induced any jury to have presumed malice in case he had been indicted for conspiracy, and would have resulted in a verdict of guilty. It is of no consequence how many of the body are accused of malice, because if one of them was disqualified that invalidated the act of the rest. This was decided in *Reg.* v. *Justices of Suffolk* (3),

(1) Law Rep. 6 Ch. 489. (2) 6 Q. B. 696.
(3) 18 Q. B. 416.

BIBL. LONDIN UNIV.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

where it was held that if any one of the magistrates having a case at sessions, be interested in the result, the Court is improperly constituted, and any order made in the case will be quashed by *certiorari*, and that it was no answer to the objection that there was a majority in favour of the decision without reckoning the vote of the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in the discussion of the other members. The definition of discretion dates from centuries back, and the authority of *Rooke's Case* (1) has often been cited. There it was said: "Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit.*" There are other authorities in support of this position, such as *Doe* v. *Haddon* (2) and *Reg.* v. *Rand* (3), in which it was held that any pecuniary interest, however indirect or small, disqualified a person from acting as a judge, and wherever there was a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act. In cases of such a nature the Court will interfere.

It is not important to this argument whether the governing body sat as judges, managers, or trustees. In whatever capacity they sat, their judgment in the case of Dr. *Hayman* was *ultrà vires*, and ought to be set aside by this Court. The facts, as alleged by this bill, are, that within a week after the appointment of Dr. *Hayman* the assistant masters combined together with a view of annulling the appointment by the then trustees of the school. They concocted a letter of the most insulting description, and they accused him of an improper use of testimonials, and of not coming among them with the support of former lovers of the school. This was at once an act of gross rebellion, and yet we find Dr. *Temple* taking part with the under masters, expressing his opinion that they were justified in their conduct, and offering to be their spokesman before the governing body. At this period Dr. *Hayman*

(1) 5 Rep. 99 b. (2) 3 Doug. 310.
(3) Law Rep. 1 Q. B. 230.

was the guest of Dr. *Temple* for three days, and while offering him hospitality he was plotting against him, and writing immediately to the trustees to express his disapprobation of their appointment. But the only ground alleged against him was the improper use of testimonials, and this ground was completely destroyed by the resolution of the trustees, who unanimously agreed that Dr. *Hayman* had acted with perfect good faith in the use made by him of the testimonials laid before them. It may be presumed that Dr. *Temple* acted as he did under a strong sense of imperative duty; but the passion and prejudice which could mislead such a man to believe that he was doing his duty, absolutely disqualified him from sitting in judgment when the resolution dismissing Dr. *Hayman* was passed. It was impossible for such a man to divest himself of his bias and act justly towards the Plaintiff. Dr. *Bradley's* conduct was almost as objectionable as that of Dr. *Temple;* he had been an assistant master, and we find him siding with the masters and with Dr. *Temple*, and publishing a letter in the newspapers for the purpose of injuring the Plaintiff's character and influencing the decision of the trustees. The evident bias and prejudice exhibited by both these gentlemen incapacitated them from sitting as judges on his conduct. In these acts we have sufficient to ground the allegation in the 11th paragraph of the bill, that Dr. *Temple* and Dr. *Bradley* formed the scheme and design of procuring by every means in their power the annulment of Dr. *Hayman's* appointment, or otherwise of so harassing and thwarting him in relation to the school, and so disparaging him in the eyes of the public, as to make his position as head master intolerable, and so, if possible, compel him to resign. Then we find these two persons, in furtherance of their design, becoming members of the new governing body, and thus acquiring power to carry out their scheme. The old trustees had acted with fairness towards the Plaintiff, and in a conciliatory manner between him and the under masters, but the moment the new governing body came into power the conduct was altered. They were at once tainted with the prejudice and affected by the presence of Dr. *Temple* and Dr. *Bradley*. The under masters continued their opposition to Dr. *Hayman*, and it was necessary for him to make some changes. In the first place, he removed two of the house tutors, Mr. *Scott* and

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

Mr. *Robertson*, which was approved of by the trustees, who, in pursuance of Dr. *Hayman's* wish, dismissed Mr. *Scott* from being a master of the school; but this dismissal having been informal, it was not carried out before the trustees had given place to the new governing body, and after that period no step was taken by them to carry out the order. The next question which arose was as to the appointment of a junior master to a boarding house in lieu of the senior master. This was objected to by the governing body, notwithstanding the clause in the *Public Schools Act* giving the head master power to dismiss at his pleasure any of the under masters. They could stand upon their own right to dismiss Dr. *Hayman*, but would not admit his right to dismiss them. Then, again, when the question was raised as to giving permission to Dr. *Scott* to take pupils, the governing body were opposed to Dr. *Hayman*, who, if he made a mistake in the charge brought against him, made the most ample apology for that mistake. Still the governing body sided against Dr. *Hayman* and in favour of Mr. *Scott*, and they told the Plaintiff that, unless he could act cordially with Mr. *Scott*, they might find it necessary to remove him from the office of head master. They could hold this language to Dr. *Hayman*, but they could not see the propriety of requiring Mr. *Scott* to act more cordially towards Dr. *Hayman*. The last ground of complaint was that of discharging two of the masters who were not the most junior masters. There again the governing body decided that Dr. *Hayman* was wrong, when, in truth, they had no right whatever to interfere with the exercise of Dr. *Hayman's* power under the Act to discharge such masters as he might think fit. Dr. *Hayman* was, in fact, treated in a most unbecoming manner by the governing body from the moment Drs. *Temple* and *Bradley* became members. The complaints of the assistant masters were listened to; they were upheld in their opposition to the head master, and threats were held out to Dr. *Hayman* upon each occasion that he would be dismissed. The conduct of Dr. *Temple* and Dr. *Bradley* throughout the whole proceedings was fully sufficient to warrant the charges made by the bill; that, under the circumstances, the resolutions and proceedings of the governing body were adopted out of the predetermined hostility and motives of resentment and party spirit on the

part of Drs. *Temple* and *Bradley*, and out of the exercise by them of undue influence over the other members of the governing body, and the undue and culpable submission on their part to such undue influence, and, in fact, out of motives which, according to the rules of equity, are improper and corrupt.

Mr. *J. Pearson*, Q.C., also in support of the bill:—

Upon these facts in the bill there are three questions arising for the consideration of the Court:—First: What is the position of the governing body, and what are the relations between the governing body and the head master? Secondly: What is the jurisdiction which this Court has in the present case? And thirdly: Is it proper that the Court should exercise its jurisdiction, and if so, in what way? On the first of these questions it has been contended that the governing body are not judges and they are not trustees, but they are controllers and managers of the school. They are to act conscientiously; they may not be politically or pecuniarily corrupt, but subject to those restrictions they have the most unlimited power in discharging the head master, without giving any reason, at their mere caprice, and without any appeal to any jurisdiction or authority in this country. We are told that the head master is not the *cestui que trust* of the governing body, but what position he fulfils we are not told. If they had gone on to define the position of the head master they would have discovered the fallacy of their arguments. If this autocratic governing body have this enormous and uncontrolled jurisdiction, then it is a corporation *sui generis*, one unknown to the law, a creature of the Act of Parliament, and without a syllable of intimation by the Act to give that immunity from the action of the law and from Courts of Equity which is now claimed. They must be supposed to stand in the position of visitors of the school, but that is not indicated by the Act.

The attempted withdrawal of the governing body from the action of the Court is an act of mere imagination on the part of the Defendants' counsel in order to sustain one of the most arbitrary and illegal resolutions ever passed by any governing body.

The *Public Schools Act* was not passed for the purpose of creating

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

a new description of governing body, but solely for the purpose of improving the management of these public schools.

This school was originally a charity founded by a grocer of *London*. It was nothing more than a charity, and the Act of 17 Geo. 3, c. 71, was passed to enable the trustees to found and maintain a school and almshouses at *Rugby;* and the school-house, almshouses, lands, and property then belonging to the school and charity, were vested in such trustees for the purposes of the Act, and they were to be styled "The Trustees of the *Rugby* Charity, founded by *Lawrence Sheriff*, of *London*, Grocer." The rules state that the head master, Mr. *Burrough*, was to be continued so long as he should behave well, and all the masters who should succeed Mr. *Burrough* were to be chosen by the trustees, and to be removable at the will and pleasure of such trustees. The trustees, therefore, had the same power as is now vested in the governing body under the *Public Schools Act* of 1868, the only difference being that the old trustees could only remove the head master at their meeting in August, afterwards altered to July. There was no intention on the part of the Legislature to change the nature of the foundation by the Act. The school was not to cease to be a charity, and subject to the rules of other charities. The existing trustees were to be the governing body until the election of a new set of trustees, who were to be the new governing body, but there is nothing to withdraw them from the jurisdiction of this Court, which is always exercised over trustees. The present governing body are amenable to the Court precisely as the old trustees of the charity were. It is not because they have a new title that therefore the power of the trustees is gone. They still have the sole distribution of the charity property devised by the founder of the school, and have power to make regulations as to the disposal of the property. They are in all respects trustees notwithstanding that they have a new title. There was no absolute necessity imposed by the Act for altering the existing governing body, as the old trustees were called, and if they had not been altered there could have been no pretence for saying that that governing body could have withdrawn itself from the jurisdiction of the Court.

The present governing body have the same power over the

property of the charity as the old trustees had, and whoever may continue to be the trustees of the property can do nothing with the charity estates except according to the bidding of the governing body. Whatever estate at law might remain in the old trustees they would hold it simply as it should be disposed of by the new governing body, and if so, they hold it as trustees.

The case of *Daugars* v. *Rivaz* (1) shews what is sufficient to constitute trustees and make them amenable to the Court. It was there held, that, notwithstanding the rights of the Crown as visitor, this Court had jurisdiction to see to the performance of the trust with which the funds were impressed, and to determine on the validity of the dismissal of the pastor; and the Court, having come to the conclusion that it was not justifiable, granted an injunction to restrain the governing body from hindering the pastor in the exercise of his office.

We say, therefore, that the governing body, having the same control over the income of the trust property that the trustees had, that constitutes between the governing body and the Plaintiff the relation of trustee and *cestui que trust*. When Dr. *Hayman* was appointed it was to be "at the salary of £113 6*s*. 8*d*. per annum, and the authorized capitation fees and other emoluments pertaining to the office." The appointment was therefore made by the trustees acting as trustees of the property. They had a trust which they were bound to perform in appointing the head master; and the governing body, still acting as trustees, have given Dr. *Hayman* notice to give up the possession of the house and property of the charity, which is an admission that it is vested in them.

If Dr. *Hayman* does not stand in the relation of *cestui que trust* to the governing body, then he must be in the position of their servant. If the intention of the Act had been to degrade the head master to the situation of a clerk or a butler, then no gentleman of education would have been found to accept the office. The case of *Attorney-General* v. *Magdalen College* (2) shews the distinction between master and servant, and trustee and *cestui que trust*. There the Court refused to interfere because there was a visitor; and there was no evidence of a trust; and if the Legis-

(1) 28 Beav. 233. (2) 10 Beav. 402.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

lature had intended the governing bodies appointed by this Act to have the position and functions of a visitor, it would have done so by express enactment, and this not being done shews that it was not the intention, but that they were to be trustees. The distinction exemplified in *Whiston* v. *Dean of Rochester* (1) is, that where there is a body holding funds, and having the control of funds, to be held for certain definite purposes, that constitutes the relation of trustee and *cestui que trust*. Dr. *Hayman* is vested with the right to receive a sum of money annually out of the charity property, and all other emoluments pertaining to the office; consequently the relation of a *cestui que trust* is established in his case. I say, then, that the new governing body are the successors of the old trustees as far as Dr. *Hayman* is concerned, and this Court has the same jurisdiction over the governing body as it had over the old trustees.

In *Willis* v. *Childe* (2) this distinction is also shewn, where there was a power in the governing body to remove the master upon such grounds as they should at their discretion, and in due exercise of the powers and trusts vested in them, deem just. There it was held that, although they had the power to dismiss the master at their pleasure, they could not do so free from the control of this Court.

All we want in this case is, that the Defendants shall put in an answer, in order that we may see whether they have made up their minds honestly and independently, without being influenced by any corrupt or malicious motives, that is to say, *malâ mente*.

The resolution dismissing Dr. *Hayman* is founded on "the administration of the school from the period when the governing body came into office to the present time." This is the reason given by implication for the resolution at which the governing body arrived. The reason extends to those accusations brought from time to time against the Plaintiff, in which it can be shewn that they acted irregularly and improperly. The Court is justified under this resolution, in considering whether the grounds of dismissal are sufficient. In all cases where there is absolute power of dismissal it may be given without reasons, but where reasons are given, then they must be such as can be substantiated. This

(1) 7 Hare, 532. (2) 13 Beav. 117.

was decided in *Reg.* v. *Bailiffs of Ipswich* (1), and in *Rex* v. *Bishop of London* (2), and *Re Beloved Wilkes' Charity* (3). If the trustees think fit to state a reason, then the Court may say that they have come to a wrong conclusion on that reason. The acts charged against Dr. *Hayman* are the three separate cases designated as Mr. *Green's* case, Mr. *Scott's* case, and Messrs. *Sedgwick* and *Smith's* case, in each of which the governing body had taken part against Dr. *Hayman* and in favour of his opponents, and in which they had shewn an amount of injustice and unfairness which could only have been caused by the undue and improper influence of Dr. *Temple* and Dr. *Bradley;* and this is most clearly proved by the fact that the old trustees, before the advent of these two gentlemen, had testified their approval of Dr. *Hayman's* conduct.

These, then, are the reasons for the resolution of the governing body; but it is submitted that such reasons are wholly unsubstantial and insufficient for the removal of a head master, and it is for the Court to decide whether the governing body were justified in their conduct, or whether they were not, on the contrary, actuated by improper motives, as alleged by the bill. The allegations in the bill are not mere pleader's colour, but are warranted by the facts which are admitted by the demurrer to be true.

If these gentlemen are not trustees, they are, at any rate, judges; for, if not so in name, they are given judicial functions, and they must exercise those functions under the same rules of justice and equity by which all judges are bound. Under any circumstances, where a body of men have absolute powers given them, they are bound to act upon principles of propriety and fair play.

What, then, is the duty of the Court as to its interference in such a case, and what is the rule of law as to the propriety of conduct upon which such a governing body ought to act? The power to dismiss a head master is a judicial power, and they are bound to act on the same principles as every Judge acts. If they bring to the decision of such a case as this improper motives, a Court of Equity will interfere, and will annul the decision. In *Bacon's* Abridgment (4), the rule is laid down as to where the partiality of a juror is a good cause of challenge, in these words: "So, also, if

(1) 2 Ld. Raym. 1232.
(2) 13 East, 419.
(3) 3 Mac. & G. 440.
(4) Vol. iv. p. 561 (Dodd's Ed.).

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

he has declared his opinion touching the matter," "or has done any act by which it appears that he cannot be impartial." Partiality is laid down as one of the strongest reasons for setting aside a decision. The case of *Dummer* v. *Corporation of Chippenham* (1) is an authority shewing that a corporation will not be permitted to act corruptly in the execution of its trust. *In re Fremington School* (2) is to the like effect.

Partiality and prejudice are as bad as corruption. The Courts have frequently decided that Judges must act without bias of any kind. Where there is an absolute power of removal, it will be controlled wherever it is shewn to have been exercised from a corrupt or improper motive, or upon charges which have not been proved, or fairly and impartially investigated. In *Reg.* v. *Justices of Suffolk* (3), Mr. Justice *Wightman* said, "It is very important that no magistrate who is interested in the case before the Court should interfere, while it is being heard, in any way that may create a suspicion that the decision is influenced by his presence or interference;" and in cases of arbitration it has been held, that if an arbitrator has expressed an opinion on one side or the other, the award will be dismissed. The cases of *Munday* v. *Knight* (4), *Gilbert* v. *Lewis* (5), and *Chicot* v. *Lequesne* (6), support this argument. Upon all these authorities it is submitted that the case is brought within the jurisdiction of the Court, and that the charges contained in the 11th, 88th, 114th, and 135th paragraphs of the bill are made out with sufficient clearness to require an answer to be put in by the Defendants.

Mr. *Morgan Howard*, and Mr. *H. A. Giffard*, followed on the same side, and cited *Archibald's* Practice in the Crown Office (7), and *Mallalieu* v. *Hodgson* (8), for the purpose of shewing the practice at common law in respect of the proceedings under a writ of mandamus.

Mr. *Cotton*, in reply:—

I agree that you must take the statement in the bill as admitted, so far as the law goes, but there is nothing charged against the

(1) 14 Ves. 245.
(2) 11 Jur. 421; S. C. 10 Jur. 512.
(3) 18 Q. B. 421.
(4) 3 Hare, 497.
(5) 1 D. J. & S. 38.
(6) 2 Ves. Sen. 315, 318.
(7) Page 301.
(8) 16 Q. B. 689, 716.

governing body which can substantiate the allegations inserted by the pleader. I only admit the facts for the sake of the legal argument, not for the purpose of the extraordinary charges founded upon no facts whatever.

The head masters of all the schools to which the *Public Schools Act* applies, hold their office as servants of the governing body, who can dismiss them at their pleasure. Men of high position, such as constitute the governing body of these schools, would never consent to act in that capacity if, when they dismissed a head master for reasons which appeared good to themselves, they were to be subject to a Chancery suit.

By the *Schools Act* of 1864 it was enacted that persons to be appointed under the Act should take and hold office subject to such provisions and regulations as might be thereafter enacted concerning the same. Then the *Public Schools Act* of 1868 expressly enacts that the head masters who shall be appointed shall hold their office at the pleasure of the new governing body. Dr. *Hayman* was appointed in 1869, and the new governing body did not come into office until 1871. It has been contended that inasmuch as Dr. *Hayman* was appointed by the old trustees he could be removed only under the regulations affecting the old trustees, and that as he was dismissed, not at a meeting held in July, but at another time of the year, the resolution of dismissal is void; but that position cannot be maintained, and Dr. *Hayman*, in dismissing Mr. *Scott*, acted upon the construction of the Act now contended for by the governing body. Upon the coming into existence of the new governing body the old Act ceased, and the head master was removable at the pleasure of the new governing body. It is said that this can only be done under the new rules and regulations to be afterwards framed, but the power of dismissal is not affected by the new rules and regulations to be framed. The Act would not, perhaps, apply to a master appointed before 1864; such a master would have to be dismissed under the old regulations of the school. That was the question raised with regard to Mr. *Scott*, but it turned out that by an accident his appointment was made out after 1864, and therefore Dr. *Hayman* had a legal right to dismiss him; but just as Dr. *Hayman* claimed a right to exercise that power against his under masters, so do the governing body claim the right to dismiss

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

their head master, who was appointed after 1864. All that the governing body maintains is, that it is for the best interests of the school that Dr. *Hayman* should be dismissed. If the resolutions passed by them were to be set aside it would be impossible for the assistant masters to continue to act under a man who has attacked them in this way; and the governing body are of opinion that the only course open to them is to dismiss the head master rather than that all the assistant masters should leave.

As to the relation of the new governing body with the old trustees, I do not dispute the right of this Court to interfere, if the resolution is bad, to prevent Dr. *Hayman* from being turned out of the school-house; but my contention is that the resolution has not been passed by the governing body as trustees, but as the governing body appointed by the Act. You must regard their power and the position in which they passed this resolution, and not look on them as to their powers as trustees. We are not now considering the execution of their trust, but their conduct with regard to the management of the school. The fact that they have the school-house vested in them does not raise any such construction as that in *Daugars* v. *Rivaz* (1). If the resolution is not good, then I admit the Court would have a right to interfere. What I question is the jurisdiction of this Court to say that the resolution is bad. If, without dismissing him from being head master, they were seeking to turn him out of the trust property, then the Court might interfere. On these grounds I say that most of the cases cited to shew that we are trustees have no bearing upon the matter. We are not inquiring about the resolution passed by the governing body in their position of trustees, but in their position of a governing body. The argument on the other side is a fallacy, when they say we succeeded the trustees of the charity, and therefore we are trustees. It is upon what has been done by the new governing body as managers of the school that the Court is called upon to act.

It cannot be said that the governing body were exercising a judicial power. A consideration of their true position gets rid of all the argument based upon judicial power. A person acting judicially cannot be said to act on his pleasure; when he acts according to his pleasure it is not judicial. Judicial discretion is very dif-

(1) 28 Beav. 233. 6 Jur. N.S. 854

ferent from pleasure *ad libitum*. When once you have the judicial faculty admitted, there is an end of acting "at pleasure." The governing body, on the contrary, are not to decide as a Judge would decide, who is bound by legal and technical difficulties, but they are bound to say, yes or no, whether the head master is to remain or to be dismissed. I question the right of this or any other Court to interfere with them on grounds which might be right in forming the decision of a Judge. It is essential that this should be held in view—that there is no appeal against their decision as a judicial decision. Suppose Mr. *Sidgwick* had appealed against the decision of Dr. *Hayman* when he was dismissed, on the ground that although he was not a married man he was just about to be married, and that he based his expectations in life on retaining his appointment, how could such a question be discussed? If the governing body come to the conclusion that it is for the benefit of the school that the head master should be dismissed, it is sufficient for them to say, "We are not satisfied with your stewardship, and you must go." To these men Parliament has intrusted the duty of removing the head master at pleasure, and the reason of such a course is obvious. It is for the purpose of avoiding the scandal which might arise from investigating in a Court of Law every question which might arise, that Parliament has said, "You are the governors, and you are not answerable to any one for your conduct except to Parliament." Why should not any rejected candidate for office under the governing body come to the Court and say the same: "My testimonials were the best, and I ought to have been elected." If not in one case, why not in the other? This throws out of the argument many of the authorities which have been cited. It was said in *Reg.* v. *Rand* (1) that pecuniary interest might disqualify a person from acting as a Judge in the matter, but circumstances from which a suspicion of favour might arise did not produce the same effect. The question as to the decision of a Judge is, however, of a different kind, for he has to consider the rules of law and not to consider the details of personal disadvantages, and not to see whether a man is married or single, as Dr. *Hayman* did in the case of Mr. *Sidgwick*.

Neither does the case in *Bacon's* Abridgment (2) apply, because

(1) Law Rep. 1 Q. B. 230.

(2) Vol. iv. p. 561 (Dodd's Ed.).

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

juries are bound to decide upon the evidence brought before them, and not according to their pleasure. Then, as to arbitrators, this is not the case of an arbitrator being biased, but whether two men out of twelve, having a bias, have so vitiated and leavened the whole mass of the governing body that the other ten were incapable of forming a right opinion.

On what ground, then, is the Court asked to set aside the resolution? It is not alleged that they had any pecuniary interest, or that they wished to elect any friend of their own. It is not asserted that they acted maliciously, but only with partiality and bias; that Dr. *Temple* and Dr. *Bradley* came to the consideration of the case with preconceived opinions and strong prejudice, and that the governing body yielded too readily to their views. These allegations might have weight if you were dealing with trustees, or a person acting judicially; but it is not so. They are acting in the management of the school, and the only charge upon which the Court could interfere would be that they acted corruptly, which is not even charged.

It has been said that before the new governing body was appointed the trustees favoured Dr. *Hayman*, but that immediately afterwards a different course of conduct was initiated, and that this was owing to the introduction of Dr. *Temple* and Dr. *Bradley;* but it was not so by any means. The new governing body acted with great leniency towards Dr. *Hayman*. They investigated the charges made against him; they advised him to act in a more conciliatory manner; they gave him several warnings that his conduct was not approved of, and it was not until two years after their coming into office that they felt themselves bound to carry out their powers of dismissal. They have given no reasons for the resolution they came to, except that he is not a fit man to be head master. That is their opinion, and it is not for the Court to say that upon the facts of the case it would have come to a different conclusion. They were men fully competent to exercise the powers given them. They had every opportunity of knowing all the details of the various complaints made against Dr. *Hayman*, and they were better able to form an opinion than any Court would be. In the case of *Rex* v. *Bishop of London* (1)

(1) 13 East, 421; 15 Ibid. 117, 146.

no reasons were given for the refusal of the bishop to signify his approbation, and the Court said there was no instance of a mandamus to the ordinary to admit a candidate to holy orders, or to specify the reasons why he refused. The bishop stood only upon his objection to the fitness of the person, and the statute meant that the bishop should be the judge of such fitness.

In *Willis* v. *Childe* (1) there was a power to remove the master upon such grounds as the trustees should, in the due execution of the powers of the trust reposed in them, deem just, provided that the grounds of such removal should be stated on the book of minutes. It was therefore part of their trust, and not a mere power to dismiss at pleasure; but the reasons were to be given in order that they might be examined into. So, in *Dean* v. *Bennett* (2), there were special provisions as to the manner in which the dismissal was to take place, and it was decided that the meeting for the purpose of bringing charges generally was improper; that if no reasons had been given it might have been good; but that under the circumstances it was clear that the meeting had not had the opportunity of exercising a sound discretion in the matter, and on that account the dismissal was invalid, as well as on account of the informality of the notice of the meeting. *Re Beloved Wilkes' Charity* (3) only laid down that if trustees have to exercise a discretion, they are not bound to give reasons. The Court would not interfere unless there was evidence of their having acted otherwise than fairly and honestly. That case, therefore, is in favour of our contention.

These gentlemen, however, are not acting as trustees, but as a governing body of the school. In *Doe* v. *Haddon* (4) the decision turned upon the conduct of the governing body in acts extraneous to the management of the school, and in *Reg.* v. *Bailiffs of Ipswich* (5) the dismissal was to be on good cause shewn, and then the officer could not be discharged without cause.

In this case there can be no inquiry, because no matter of fact is alleged which is capable of being inquired into. It has been attempted to connect the final resolution with the previous com-

(1) 13 Beav. 117.
(2) Law Rep. 6 Ch. 489.
(3) 3 Mac. & G. 440.
(4) 3 Doug. 310.
(5) 2 Ld. Raym. 1232.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

plaints, but the governing body distinctly declined to reopen the former complaints, and they decided upon the general unfitness of the Plaintiff to be head master, and on his whole conduct since he came to the school. It cannot be said that the acts of the governing body were based upon matters *dehors* the management of the school. They formed their opinion upon all the facts which came to their knowledge, that Dr. *Hayman* was not the right man for the place, and there is nothing to shew that they had any malicious feeling in the matter. It is not for the Court to dive into the thoughts of these gentlemen. They have their power to act direct from the statute, and whether they acted judiciously or not, has nothing to do with the question.

The whole argument has been on the allegation that these two gentlemen, Dr. *Temple* and Dr. *Bradley*, formed a scheme to get Dr. *Hayman* removed from the post of head master, and that they used their influence over the rest of the governing body to induce them to pass the resolution dismissing him, and that this conduct entirely vitiated the resolution. The Court then is asked to set aside the decision on the ground that ten men were so influenced and misled by the other two that they were incapable of forming an independent opinion. The charge is in itself so frivolous that it does not bear consideration. Under any circumstances, the Court has no jurisdiction whatever to interfere, and it is better that this fact should be made known at once upon demurrer to the bill, than that delay and expense should be incurred by continuing a litigation which can only lead to scandal and bad feeling.

March 21. SIR R. MALINS, V.C.:—

This is a suit instituted by the Rev. Dr. *Hayman*, the present head master of *Rugby School*, against the governing body of that school and the Right Rev. the Bishop of *Exeter*. The case is one of great importance. It has occupied a large portion of the time of the Court, and it has been most ably argued during six days of the present and past weeks. The facts of the case as stated in the bill are these: The Rev. Dr. *Temple*, in the year 1858, was appointed head master of *Rugby*, and in the year 1869 he was appointed

Bishop of *Exeter*, and thereupon, as a matter of course, resigned the head mastership of *Rugby*, to take effect from Christmas, 1869. The Plaintiff was at that time head master of *Bradfield College*, to which he had been appointed in 1868. His appointment to *Bradfield College* had been made in the same way as his appointment to *Rugby School* was afterwards made, viz., by public competition. He and other persons desirous of being appointed, sent in testimonials shewing their fitness for the office, and upon an examination of these testimonials he was selected. Upon the resignation of Dr. *Temple* being delivered to the trustees, they caused advertisements to be published in the newspapers, requesting those who wished to become candidates for the office of head master to send in their applications, accompanied by testimonials as to their qualifications, by a day named, and in accordance with such advertisements, and as is usual in such cases, the Plaintiff sent in to the trustees a written application for the office, together with written or printed testimonials of the Plaintiff's character and attainments signed by various persons, and bearing various dates. All the testimonials are dated, and have the actual date on which the same had been given to the Plaintiff by the writer thereof, with the following exceptions, viz.: a testimonial from the late Professor *Connington* was not dated, and a testimonial from the Rev. Dr. *Holder*, then head master of *Ipswich School*, was dated September 11, without specifying the year.

By a resolution on the 20th of November, 1859, the Plaintiff was appointed head master of *Rugby School* by the trustees, the governing body at that time, and they were the trustees of *Rugby* Charity. Those of the trustees who were present on that occasion were Mr. *Wise*, M.P.; the Duke of *Marlborough*, the Earl of *Warwick*, Lord *Charles Bertie Percy*, Lord *Leigh*, Sir *C. B. Adderley*, M.P.; Mr. *Newdegate*, M.P; Mr. *Davenport*, M.P.; the Rev. *C. W. Holbech*, and Colonel *North*, M.P. The appointment of the Plaintiff having been made on the 20th of November, 1869, on the 19th of December, 1873, the new governing body of *Rugby School* came to a resolution that Dr. *Hayman* be removed from his office of head master. Such removal to take effect on the 7th of April next.

From the 19th of November, 1869, therefore, up to the present

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

time, Dr. *Hayman* has been head master, and he has been by these resolutions removed from that position as from the 7th of April next. It must be observed that the original appointment of Dr. *Hayman* was made by the trustees of *Rugby* Charity. The duties of these trustees with regard to the head master are prescribed by the provisions of the 17 Geo. 3, c. 71; but I think it necessary to refer only to the first and second:—First, the Rev. *Stanley Burrough*, M.A., the present schoolmaster, to be continued so long as he shall behave well, and the house now inhabited by the said *S. Burrough* to be the place of his residence, and of the residence of all the masters of the grammar school who shall succeed him, and the room now used as a school to be the place in which the boys resorting to the school shall be taught grammar and the Latin and Greek languages; and second, that all the masters of the school who shall succeed the said *S. Burrough*, the present master, the usher or ushers, and the writing masters who shall succeed those first to be nominated, as hereinbefore mentioned, shall be chosen within three months next after any vacancy shall happen by the trustees, or the major part of them, present at a meeting to be held for that purpose, and be removeable at the will and pleasure of the trustees or a major part of them present at their meeting on the first Tuesday in the month of August. By a subsequent Act of Parliament, the third Tuesday in July was substituted for the first Tuesday in August, the latter month having been found inconvenient for holding meetings in. It is therefore clear that if the rights of Dr. *Hayman* depended upon the 17 Geo. 3, only, he was liable to be removed "at the will and pleasure of the trustees," but that such will and pleasure could only be expressed at the annual meeting to be held in the month of July. But the *Public Schools Act* was then in force, and that provided, by the 13th and 28th sections, that the head master of every school to which the Act applied should be appointed by and hold his office at the pleasure of the new governing body, and that all other masters should be appointed by and hold their offices at the pleasure of the head master; and that subject to any alterations made by that Act, or by any scheme or statute made in pursuance thereof, all powers vested by Act of Parliament, charter, instrument of endowment, custom, or otherwise in the then existing governing body of a

school to which the Act applied in relation to such school, or the government thereof, should continue in force, and might be exercised by such governing body until a new governing body should be appointed, and after the appointment of a new governing body, by the new governing body in the same manner in which they might have been exercised if that Act had not been passed. This makes no provision as to the time or place at which such "pleasure" of the governing body is to be expressed.

But it had been provided by the 27 & 28 Vict. c. 92, in these terms: The Act recites that a commission was issued in the year 1861, under letters patent of Her Majesty, for the purpose of inquiring into the nature and application of the endowments, and into the administration and management of the colleges and schools named in the schedule annexed thereto. And it recites the substance of their report, and then, in order to make those who might afterwards be appointed subject to the provisions and alterations of the laws, it enacts that "every person appointed after the passing of this Act to any office in the governing body of any of the said colleges or schools shall take and hold that office subject to such provisions and regulations as may hereafter be enacted respecting the same." Then it provides that the governing body shall mean and include the head master. That, therefore, made Dr. *Hayman's* appointment subject to any provision which Parliament might afterwards make.

The new governing body contemplated by the Act of 1869 was duly constituted in the month of December, 1871, and it consisted of the following distinguished persons:—The Bishop of *Worcester* (Chairman), Dr. *Temple*, Bishop of *Exeter* (Deputy-Chairman), the Marquis of *Hertford*, the Earl of *Warwick*, Lord *Leigh*, Sir *Charles Adderley*, Mr. *Newdegate*, Dr. *Bradley*, the Rev. Dr. *Bateson*, Master of *St. John's* College, *Cambridge*, Mr. *Smith*, Professor of the University of *Oxford*, and Mr. *Richards*, the Parliamentary Counsel, who was formerly an under-master at *Rugby* School.

The first point relied upon on behalf of the Plaintiff was that he is not liable to be dismissed by the new governing body, but that the power must be exercised by the old trustees, and as they could only exercise it at the annual meeting in July, the resolution of the 19th of December last was necessarily invalid. I am, how-

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

ever, of opinion that the Plaintiff became subject to the new governing body upon their coming into existence, and that this objection to the resolution of dismissal cannot be sustained. The Plaintiff himself always treated the new governing body as having entire authority over him from the day it came into existence. To this body his subsequent communications were addressed.

It is, in my opinion, clear that the Plaintiff and all the head masters of the great public schools to which the Act of 1868 applies are subject to the control of the new governing body of each school, and that they hold their office at the pleasure merely of the new governing body, and are consequently liable to be dismissed without notice, and without any reason being assigned. The probable intention of the Legislature in making such a provision was to avoid such contests as have so frequently occurred in this Court and the Court of Queen's Bench as to the power of trustees to remove the masters of schools. The apparent harshness of the power is mitigated by the appointment of men of high position, honour, and integrity as members of the governing body, by whom it is assumed that such power, arbitrary as it is in terms, would not be harshly, unjustly, or inconsiderately exercised.

Assuming this to be the true construction of the Act, it was then contended on behalf of the Plaintiff that this Court will control the proceedings of such bodies as this whenever it is satisfied that their powers have been exercised corruptly, unjustly, or for the purpose of effecting some collateral object, and that the circumstances of this case shew that the power of the governing body has been so improperly and unjustly exercised, and its exercise was so improperly brought about, that it is the bounden duty of the Court to interfere, and treat the resolution for the dismissal of the Plaintiff as invalid, and to restrain them from carrying it into effect. I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal, by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shewn, and that the burthen of

shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reasons need be given, but if they are given the Court will look at their sufficiency.

Upon this subject numerous authorities were cited, and I will briefly advert to most of them. The first in point of date was *Reg.* v. *Bailiffs of Ipswich* (1), which was a case in which the corporation dismissed Mr. Serjeant *Whitaker* from being their recorder. It was contended on his behalf that his office was a freehold. I only read it for the purpose of the opinion expressed by that great lawyer Lord Chief Justice *Holt*, who, in disposing of the substance of the case, uses this expression: "The Solicitor-General opposed granting a peremptory mandamus because the recorder was an officer *ad libitum* of the corporation, and cited *Rex* v. *Campion* (2). But that objection was contrary to the return whereby he appeared to be confirmed for life. And *Holt*, C.J., said, that if he had been an officer *ad libitum* the corporation ought to have returned that and relied upon it, and it would have been a good return; but they could not take advantage of that when they had returned a cause, if the cause were not sufficient; for it appeared that they had not gone upon their power and determined their will, but put him out for a misdemeanor." It is plain, therefore, that Lord Chief Justice *Holt* considered that if they had merely returned that he held office at their pleasure, and that they had exercised their pleasure by dismissing him, the matter could have been no further inquired into, but as they had dismissed him for a misdemeanour, it was competent for the Court to inquire into the sufficiency of the reasons that induced them to dismiss him.

In *Doe* v. *Hadden* (3), one of the governing body was proved to have said that he would rather spend £500 than not turn the master of the school out, and he had also threatened the constable with the loss of his office if he did not concur in his dismissal. That again was such a proof of corrupt motive in one of the governing body as to vitiate the whole proceedings.

In *Dummer* v. *Corporation of Chippenham* (4), the master was dismissed by the governing body, who were part of the corporation

(1) 2 Ld. Raymond, 1232, 1240.
(2) 1 Sid. 14.
(3) 3 Doug. 310.
(4) 14 Ves. 245.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

there, on the alleged ground of bodily disease and infirmity of age, but the bill alleged that the resolution was really in consequence of a scheme to remove him because of his having voted at the last election in a manner opposed to the opinions of the corporation. To that bill a demurrer was put in, but Lord *Eldon* considered that there was such an allegation of corrupt motive in exercising the power, that he overruled the demurrer, and required the governing body to put in an answer.

The next case in order of date, of importance, is *In re Fremington School* (1), which was so much considered by the learned Vice-Chancellor *Knight Bruce*. That was a case in which the governing body had a power of dismissal "for neglect, or misbehaviour, or any other just cause." Various charges, I think eighteen in number, were brought against the master of the school, founded principally upon gross immorality of conduct. When the matter came before the Vice-Chancellor *Knight Bruce*, in June, 1847, in a very long and elaborate judgment he came to the conclusion that, inasmuch as three out of the governing body had in writing expressed their belief in his guilt before they went into the inquiry, that was such a disqualification for expressing any opinion that he granted an injunction restraining the resolution being carried into effect, but he left the governing body, the trustees, at liberty to reconsider the matter. Notices were sent to all the other trustees, but the result was that the same three trustees who had expressed their opinion of the guilt of the master again acted in considering the subject, and were assisted by one other trustee only; and one of the trustees, the clergyman of the parish, Mr. *Tardy*, was so adverse to the master, Mr. *Ward*, that it might well have been considered that he was actually disqualified to sit in judgment upon him. But they having done so, and having come to the conclusion that he was guilty of the gross charges made against him—cases of gross personal misconduct—the same learned Judge, reconsidering the matter after the resolution, in the next year, came to the conclusion that he could not interfere, and the dismissal took effect. I only refer to one or two expressions in his judgment. He said (2): "Then comes the consideration whether it was

(1) 11 Jur. 421; S.C. 10 Jur. 512. (2) 11 Jur. 424.

competent to these gentlemen (inasmuch as neither of their colleagues could or would sit with them) to hold a sitting for this purpose, considering all that had taken place—considering that Mr. *Tardy*"—that is the clergyman of the parish—"had expressed an opinion of the guilt of Mr. *Ward* before he had heard either him or any witness for him upon the subject, and, especially considering that Mr. *Orde*, Mr. *Surtees*, and Mr. *Wyvill*, after hearing Mr. *Ward*, came to a conclusion of his guilt, and who, moreover, previously, and without hearing *Ward* and the examination of his witnesses, had come to a conclusion of the same kind." Then he says: "Undoubtedly it placed them in a position of considerable difficulty. If Mr. *Ward* was unfit to remain in the school, if he was a mischievous and pernicious instructor of youth, and their colleagues would not sit with them, what were they to do? I think, therefore, that the jurisdiction or tribunal, if I may use such a phrase, was properly constituted. We come next to consider the charges which were brought before this domestic and private judicature thus constituted. Now the charges are eighteen in number, and it is impossible to see their number, their nature, and their variety, without feeling very great regret for more reasons than one . . . . I have nothing to do with motives, I impute none but good motives, but so is the fact. The fourth charge is, 'That you did commit'"—a very great impropriety which I need not particularly name—"Now with reference to this particular charge I must make a general observation; for which I ought to apologise, as it is almost, if not entirely, a repetition of what I said upon the former occasion, namely in June last, that I do not consider that the office of the Court is to decide whether the electors ought or ought not to have believed or disbelieved certain evidence. It is not for this Court to be satisfied, it is for the electors to be satisfied; and if upon legitimate materials which might possibly have satisfied a reasonable man desirous of doing justice, they came to a certain conclusion in point of fact, my opinion remains, that it is not the office of the Court to interfere with it." Then, for the third time, he expressed his regret that he was obliged to come to the conclusion to leave the matter to be carried into effect according to the resolution of the governing body.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

I shall mention next a very important case, *Reg.* v. *Darlington School* (1) in which the governing body, incorporated by Queen *Elizabeth*, had a power of dismissal for any just cause. It was held by the Court of Queen's Bench and by the Court of Exchequer Chamber, affirming their judgment, that by the terms of the charter the governors might in their discretion remove a master without summons or hearing, and although no charge against him had been exhibited or made. The judgment of the Court of Queen's Bench was delivered by Lord *Denman* (2). Lord *Denman* there says: "They"—that is the governing body—"are bound to remove any master whom according to their sound discretion they think unfit and improper for the office; and as that discretion may possibly be well exercised for defects of various kinds, not amounting to misconduct, so there may be misconduct incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the master without the abandonment of their duty." Then he stated that a bye-law had been passed, and they held that to be invalid. Then Lord *Denman* further says: "But they might be reasonably satisfied of the truth of the charges, without possessing any means of proving them by evidence; and even if they had no charge before them, they might still in the exercise of their discretion remove him from reasonable cause. The prosecutor"—the prosecutor of course here was the schoolmaster—"has denied the charges and the trial, but he does not deny the exercise of discretion, which might have been disproved, in fact, as by shewing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place. The allegation of removal in the exercise of discretion, is an independent allegation which the prosecutor does not deny, though it is accompanied with reasons which on the trial he disproved. But the power of the governors so to remove justifies their so doing; and it is not to be restricted by any opinion which we may form of the reasons on which they may have been induced to exert it." That came on appeal before the Court of Exchequer Chamber, and the judgment of that tribunal was delivered by Lord Chief Justice *Tindal*, and I will

(1) 6 Q. B. 682. (2) 6 Q. B. 695.

refer to one or two passages of his judgment also. He says (1): "Looking to the terms of the letters patent of Queen *Elizabeth*, we think the office in question is in its original creation determinable at the sound discretion of the governors whenever such discretion is expressed; and that it is in all its legal qualities and consequences not a freehold, but an office *ad libitum* only; the governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive; but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do .... And there seems nothing unreasonable in the founders giving such authority to the governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbours, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval, fully sufficient in the exercise of a sound discretion, might be suggested."

Then, in the case of *Willis* v. *Childe* (2), before Lord *Langdale* there was a power to remove, "upon such grounds as the trustees shall in their discretion, in a due exercise and execution of the powers of the trust reposed in them, deem just." Having that power, charges were made against the master. It was necessary to have two meetings. and meetings were convened, but the result was that no sufficient investigation took place, and Lord *Langdale* states the grounds of his coming to the conclusion that the discretion of the trustees was to be controlled by this Court. This is a specially important case, because in the very same transaction the trustees having treated the master as their tenant-at-will, had given him notice to quit the school and school-house, and had brought an action of ejectment against him, which action

(1) 6 Q. B. 715. (2) 13 Beav. 117.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

was successful, and had been decided before the judgment was given. The judgment of the Court of Exchequer upon the ejectment will be found reported (1). But when that matter came before this Court, Lord *Langdale* said (2): "The Plaintiff alleges that the power of the trustees has been corruptly exercised, or at least that there has been an undue exercise of their discretion. A great many affidavits have been filed; they contain much inconsistent evidence, and it seems to me that some at least of the trustees manifested an eager desire to find occasion to remove the Plaintiff. If, upon a fair investigation of the facts, and after just means of explanation and defence had been afforded, it had appeared that the employment of the Plaintiff had become prejudicial to the school, the trustees would have been fully justified in removing him. Upon the merits, I find it very difficult to form any conclusive opinion upon the truth or falsehood of many of the allegations which are stated; but, after reading the affidavits, I observe that some differences having arisen between the master and the usher, the trustees not troubling themselves to promote any means of conciliation or adjustment, seem to have been disposed to impute the principal fault to the Plaintiff, and instead of instituting an inquiry in his presence, which might have afforded him the means of explanation and defence, they without his knowledge commenced proceedings against him by referring the matter to the school committee to consider the case. The committee proceeded to investigate the case in his absence and without his knowledge, and reported against him. The report was not communicated to him, but the trustees met, and, as they say, considered the report, and in his absence, and without hearing him, they confirmed the report, and resolved to remove him, and stated the grounds and reasons for his removal." But Lord *Langdale* restrained the trustees from acting upon the resolution, and, as far as appears by the report, he remained in his office.

To this class of cases also belongs the case of *Dean* v. *Bennett* (3), before Lord *Hatherley*. I need not go further into that case than to state that it was the case of a dissenting Protestant congregation who had the summary power of dismissing their minister at

(1) 5 Ex. 696. (2) 13 Beav. 130, 131.
(3) Law Rep. 6 Ch. 489.

two meetings. A meeting was called, charges were made against the minister, which were not investigated, and the subsequent meeting for the confirmation of the first resolution was called, and the proceedings at the first were unknown to those who voted at the second. Lord *Hatherley*, under those circumstances, considered that though there was a summary power which might have been exercised without assigning any reasons, inasmuch as it was apparent their proceedings had been unjust, he must restrain the trustees from acting upon it. It was in that case he expressed, not disapprobation, but some doubt, as to *Reg.* v. *Darlington School* (1), to which I have already referred.

The case of *Re Beloved Wilkes' Charity* (2), before Lord *Truro*, was a case in which trustees had a power of selecting a boy from two particular parishes, to be educated at the expense of the charity as a clergyman of the Church of England. In default of their finding a fit candidate within those two parishes, they were at liberty to go to any other parish; they had gone out of the two parishes to select a candidate, and a farmer who was an inhabitant of one of the parishes, filed a bill to restrain them from carrying out the charity in favour of the boy who did not belong to one of the two favoured parishes. Lord *Truro*, in a very remarkable judgment—and I only refer to this part of it—says: "The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases. If, however, as stated by Lord *Ellenborough* in *Rex* v. *Archbishop of Canterbury* (3), trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake, and in error, and that it will correct their decision; but if without entering into details they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered, and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion. It seems therefore to me, that, having in the present case to look to

(1) 6 Q. B. 682 (2) 3 Mac. & G. 440, 448. (3) 15 East, 117.

V.-C. M. 1874

HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

the motives of the trustees as developed in the affidavits, no ground exists for imputing bad motives."

Daugars v. *Rivaz* (1) is the case with regard to a French Protestant congregation. I need not say more than that in that case the same principles were acted upon. The next is the case of *Rex* v. *Bishop of London* (2), which was a case where no minister could preach without the sanction of the diocesan. In that case the Bishop of *London* having refused his sanction to a particular candidate, an application was made to the Court of Queen's Bench for a mandamus to compel him to institute. I read it only for the expressions of Lord *Ellenborough* (3), that no person should be allowed to preach "unless he be first approved and thereunto licensed by the archbishop or bishop. Suppose he should return *non idoneus* generally, can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a mandamus to the ordinary to admit a candidate to holy orders, or to specify the reasons why he refused? If indeed it had appeared that the bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license, which had no application, and was manifestly bad, the Court would interfere; but the difficulty that I feel is that the bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the bishop should be the judge."

That came afterwards before the Court, and is reported (4). That is an application against the bishop and the Archbishop of *Canterbury*, and there it is only necessary to say that Lord *Ellenborough* again, in delivering a more elaborate judgment of the Court, says (5): "But in the instance of the lecturer the term 'approbation' in the statute 13 & 14 Car. c. 2, is quite another thing; what scales have we to weigh the conscience of the bishop? and how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license on account of many matters which cannot be conveniently stated to a Court of Justice? May he not disapprove for matters within his own personal observation and knowledge; for the

(1) 28 Beav. 233. 6 Jur. N.S. 854 (3) 13 East, 422.
(2) 13 East, 419. (4) 15 Ibid. 117.
(5) 15 East, 146.

habits of life and conversation of the person, which might be known to him from residing in the same university or society with him? from his conduct in life down perhaps to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided. What authority has he to compel the attendance of witnesses before him? The word of the statute is "approve," and he must exercise that approbation according to his conscience upon such means of information as he can obtain, and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a Court of Law, may, I am of opinion, be fitly taken into his consideration."

I need hardly say that pecuniary interest in the governing body would be conclusive. That was decided in a case which was cited in the argument of *Reg.* v. *Justices of Hertfordshire* (1), where one of the justices who decided the question had a very insignificant pecuniary interest, amounting only to £8 or £9, but that was considered by Lord *Campbell* in the Court of Queen's Bench as fatal to his exercising any judgment, and the finding to which he was a party was quashed. The same thing will be found in *Reg.* v. *Justices of Suffolk* (2). But although pecuniary interest will disqualify, circumstances which may be calculated to produce bias will not do so; and therefore in *Reg.* v. *Rand* (3), where those acting were trustees of a property which would be affected by the decision—it was a rating question—but being only trustees, and having no pecuniary interest, it was there decided that though that might produce bias, it was not a disqualification, and Mr. Justice *Blackburn*, in giving the judgment of the Court, said: "Whenever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act, and we are not to be understood to say that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubt-

(1) 6 Q. B. 753. (2) 18 Q. B. 416.
(3) Law Rep. 1 Q. B. 230.

V.-C. M. 1874. HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

ing that the justices acted perfectly *bonâ fide;* and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest, and we think that *Reg.* v. *Dean of Rochester* (1) is an authority that circumstances from which a suspicion of favour may arise do not produce the same effect as a pecuniary interest, and as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act," therefore there was a bias there, but no interest.

Upon these authorities then, and upon every principle, it is clear that if the governing body was properly constituted, and if they fairly and honestly exercised the power of dismissing the Plaintiff, their decision is not liable to be controlled by this Court. But the contention on the part of the Plaintiff is, that looking at the events which occurred on his appointment to the head mastership in 1869, and the subsequent transactions, the governing body was not so constituted as to be capable of coming to a just and impartial decision, and that its decision was in fact unjust and partial. The objection of the Plaintiff to the decision of the governing body is founded on the fact of the Bishop of *Exeter* and Dr. *Bradley* having been two members of the body, and the decision is impugned solely on the ground that it was produced by the undue and improper influence of the bishop and Dr. *Bradley.*

In order to decide the painful question between the parties it is necessary to consider the facts stated by the bill, the accuracy of which is admitted by the demurrer. And here I must repeat the regret which I expressed more than once in the course of the arguments, that the case should have to be decided on demurrer; because I cannot help thinking that many of the statements of the bill might have been materially qualified if the evidence of both parties had been given; although this course of proceeding has, no doubt, the advantage relied on by Mr. *Cotton* of preventing a painful conflict of evidence if affidavits had been read, and cross-examination upon them had taken place.

To come to the allegations of the bill: I have already referred to the circumstances under which Dr. *Hayman* was appointed on the 28th of November, 1869, and I have given the names of the

(1) 17 Q. B. 1; 20 L. J. (Q.B.) 467.

distinguished persons who made that appointment:—[His Honour then read the eleventh paragraph of the bill.] I must pause here to remark that I am bound to assume on demurrer that all statements of facts are true which are well pleaded, and I may observe that it appears that no head master of *Rugby*, for at least sixty years, has been educated at that school. The bill next alleges in effect that the assistant masters under Dr. *Temple* were twenty-one in number, one of whom, Mr. *Burrows*, was a private friend of the Plaintiff, and took no part in the hostile proceedings against him. The remaining twenty were unanimous in their support of Dr. *Temple* and Dr. *Bradley*, and in their opposition to the Plaintiff. [The Vice-Chancellor then stated shortly that part of the bill which gave the numbers of the assistant masters, and which of them were foundation masters and house masters, together with the particular duties of the house tutors, and referred to an interview between the Plaintiff and Mr. *Potts*, one of the assistant masters, at which the latter was alleged to have said, "You come amongst us as a high churchman and a Conservative," and that this would "give a shock to the traditions of *Rugby*." This, said His Honour, was a communication of anything but an agreeable character from a subordinate to his chief. But the matter did not end there, for twenty out of twenty-one assistant masters addressed to their head master a letter than which nothing could be more ill-judged.]

[His Honour then read the letter of the assistant masters to Dr. *Hayman*, written on the 27th of November, 1869, the effect of which has been already set forth in the statement of the bill, and continued:—]

This was an insult offered by the subordinates to the man who had just been appointed by the duly constituted authority to be their chief. It accused him of a fraudulent use of testimonials, and was altogether couched in such terms as to render any subsequent co-operation between them most difficult, if not impossible. Still more I think it is to be regretted that the Bishop of *Exeter*, who was so soon to be succeeded by the Plaintiff, should not only have supported the under masters, but himself have written a letter still more objectionable than theirs. Dr. *Temple* might have thought it consistent with his position to write such a letter to the governing body, and to send a copy of it to Dr. *Hayman*, and I may remark

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

that it was written after Dr. *Hayman* had been a guest of Dr. *Temple* for three days, and probably on the evening of his departure or on the morning after. I should have thought that Dr. *Temple* might have given the trustees credit for sufficient sagacity to discover the date of a letter, or the character of a testimonial. When he says he cannot express his disapproval of the step taken by the under masters, that amounts to approval. Whether he was deficient in scholarship, or in some other quality, the bishop does not state, and how the bishop could have discovered all these deficiencies in three days (for it does not appear that he had seen the Plaintiff for many years) I confess surpasses my comprehension. Dr. *Temple*, however, seriously condemned Dr. *Hayman's* appointment. Dr. *Bradley*, who was then at the head of *Marlborough College*, does not seem to have taken quite so active a part as Dr. *Temple* against the Plaintiff, but he too had written to the trustees, and not content with that, and knowing that the trustees were then shortly going to meet, he thought it consistent with his character to address a letter to *The Times*, which appeared on the very day the trustees were to meet. Therefore, that which might have passed quietly was at once published to the world, and everything which could injure Dr. *Hayman* was done. Now, what was the object of the masters, of Dr. *Temple*, and Mr. *Bradley*, in writing these letters. Was it to produce a cancellation of the Plaintiff's appointment? Did they duly reflect upon the consequences of what they were doing? Dr. *Hayman* had, no doubt, resigned his appointment at *Bradfield College* before the date of the master's letter. Were they prepared to incur the responsibility of ruining a man, so eminent as to have been selected as the fittest candidate for the head mastership of this great school by such a body of men as the then trustees? I say his ruin, because it would have been not merely the loss of *Rugby*, but the impossibility of returning to *Bradfield*, and, above all, the fatal stigma of having had his appointment to such an office cancelled, on the double ground of a fraudulent use of testimonials and incapacity. In the excess of their zeal surely these considerations must have been overlooked by the writers of these most objectionable letters. It is somewhat surprising also that it did not occur to Dr. *Temple* that if the trustees had desired his opinion on the testimonials they would have

asked for it before coming to a conclusion upon them. But fortunately for Dr. *Hayman* there was a body who took a more just view. The trustees did, as Dr. *Bradley* anticipated, meet on the Monday, which was the 20th of December, to consider the whole question of Dr. *Hayman's* testimonials, and they took an entirely different view to that of the writers of the letters, and unanimously resolved that he had acted with perfect good faith in the use he had made of them. Upon this conclusion it is, I think, to be lamented that the trustees did not require the under masters to withdraw their letter with an apology to Dr. *Hayman*. That, I think, was the least he was entitled to from them, and if that was refused, then, I think, they should every one of them have resigned. This, however, was not done, and it was under those circumstances that he had to begin his career as the head master of this school in January, 1870, with twenty out of twenty-one under masters in this state of insubordination or rebellion. What chance of success had he? It is plain that he never had a chance. If it had not been for these unfortunate circumstances, I see no reason to doubt that his head mastership would have been entirely successful.

The Plaintiff then entered upon his duties as head master in the month of January, 1870, having, during the Christmas holidays, appointed a master in the place of Mr. *Potts*, who had resigned, and the attitude of the under masters, especially of the two house tutors, in the school-house, continuing hostile, the Plaintiff, on the 10th of November, 1870, wrote a letter to the trustees:—

[The Vice-Chancellor then read this letter, in which, after dwelling upon the confidential relations between the house tutors and the boys, and giving his reasons for not retaining the then house tutors at the school-house, who were Mr. *E. A. Scott*, and Mr. *J. Robertson*, he stated that he proposed to dismiss those gentlemen. His Honour also stated the correspondence and resolutions of the trustees following thereon, whereby the trustees at first passed a resolution dismissing Mr. *Scott*, and then rescinded it, on the ground that, being a foundation master, they could only dismiss him at a general meeting.]

With this the action of the old trustees ceased, and the new governing body came into operation, and Dr. *Temple* and Dr. *Bradley* are found amongst its members. It is, I think, to be

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

regretted that, considering all that had passed upon the appointment of Dr. *Hayman*, the Bishop of *Exeter* and Dr. *Bradley* should have allowed themselves to be put on the governing body while Dr. *Hayman* continued head master. It was calculated to cause, and has no doubt caused great dissatisfaction on his part, and has embittered some of the discussions which have since taken place. At the same time, I am far from saying that I am bound to consider that two such men when put in the responsible position of governors of this school, with *quasi* judicial duties to perform, were incapable of throwing off opinions which they had entertained two years before. Unfortunately, however, differences of opinion soon arose between Dr. *Hayman* and the new governing body as to which it is not necessary for me to express an opinion which was right or which was wrong; probably neither of them was quite right. The first difference of opinion was as to Mr. *Green's* case. It arose thus: Mr. *Burrows* had resigned; he was one of the house masters, and therefore his house became vacant. It seems that the usage of *Rugby*, which is, I think, consonant with all propriety, was that when a house became vacant the next senior master should succeed to it. It is a proper thing, because length of service should not be passed over. It is the rule in the army, in the navy, in the civil service, and in the law. Dr. *Hayman's* excuse was that the under masters were insubordinate, and Mr. *Green* was subordinate; that he was efficient, and that he, in his judgment, thought fit to place him over the senior masters. This caused great dissatisfaction, and led to a remonstrance, and letters were addressed by the President, the Bishop of *Worcester*, to Dr. *Hayman*. All this correspondence was of a very unsatisfactory character. The next matter in dispute was Mr. *Scott's* case. He had taken an active part against Dr. *Hayman*, and it seems that some serious misunderstanding had taken place between them. Dr. *Hayman* appeared to think that Mr. *Scott* had done something which was very improper, but I know nothing of it, and it is not in the bill, therefore I cannot go into it. Dr. *Hayman* was of opinion that Mr. *Scott* should not any longer remain a master of the school. That led to a resolution against Dr. *Hayman* on the part of the governing body, and they required him to make some concession, and to be reconciled to Mr. *Scott*. On the 28th of

November, 1872, the governing body passed a resolution, expressing an opinion that an apology was due to Mr. *Scott* on the part of Dr. *Hayman*, and that if Dr. *Hayman* was not prepared to act in future in a spirit of cordial good will towards Mr. *Scott*, they thought it due to the interests of the school that Dr. *Hayman* should lose no time in retiring from the office of head master. An observation was made by Mr. *Glasse* and by Mr. *Pearson*, which was, I think, well founded, that while they imperatively called upon Dr. *Hayman* to act in a spirit of forbearance towards Mr. *Scott*, he was not called upon to act in that spirit towards Dr. *Hayman*. Mr. *Scott* had been a formidable opponent throughout, yet so far as I can discover Dr. *Hayman* had acted in a spirit of cordial good will towards Mr. *Scott*. I find no complaints to the contrary in the bill, and Dr. *Hayman* wrote in January, 1873, to Mr. *Scott*, saying that he was very desirous of carrying out the spirit of the minute of the governing body, and he repeated that he withdrew the whole statement sent to him in August, and added his earnest desire to act in a spirit of cordial good will, which he hoped to find reciprocated. This letter Mr. *Scott* referred to the governing body to say whether in their judgment it was such a letter as he had a right to expect. Then on the 14th of January, the Plaintiff wrote again to Mr. *Scott*, expressing surprise that a part of his first letter should have been thought open to misconstruction, but if so, he begged him to consider it withdrawn. In my opinion Dr. *Hayman* on this occasion made the most ample concessions, and acted in the most conciliatory manner, and after various other proceedings the matter regarding Mr. *Scott* ended.

The next subject of difference between Dr. *Hayman* and the governing body arose thus: The school, as might have been expected after such dissensions, had diminished in numbers; and in consequence of the diminution, it was incumbent upon Dr. *Hayman* to reduce the number of masters. Here, again, it is contended that the usage of the school was, when a necessity arose for diminishing the number of masters, to dismiss the junior masters and to leave the seniors, and I think, upon the same principle to which I have adverted, it must be admitted that that was the proper practice. But, however, that was not the course adopted by Dr. *Hayman*. Finding it necessary to dismiss two masters, he

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

fixed upon Mr. *Sidgwick*, who had been a very active opponent, and Mr. *Smith*. He selected Mr. *Sidgwick* for a reason which, no doubt, appeared to him a very good one, that he was the only unmarried master. He thought a bachelor could afford to give up his appointment better than a married man. That view is open to many objections; and the mere fact of his being an unmarried man was not, in my opinion, a satisfactory reason why the senior master should be selected instead of the junior. However, this again led to painful contests, and again the governing body took a view opposed to the head master, and in favour of the under masters; and there were various resolutions, the first of which was on the 20th of November, 1872, when it was suggested to Dr. *Hayman* that if he could not act cordially with the other masters he should resign. On the 5th of December, 1872, there was again a resolution to the same effect. Four times there were suggestions that Dr. *Hayman* should resign, and finally, on the 19th of November, 1873, resolutions were passed by the governing body that Dr. *Hayman*, in their opinion, by giving notice of dismissal to Mr. *Sidgwick* and Mr. *Smith*, had not acted in accordance with the undertaking given by him to observe the usages and customs of the school, and they accordingly required him to place his resignation in the hands of the clerks on or before the 23rd of December, to take effect the following Easter. That was communicated to Dr. *Hayman* on the 18th of December, and Dr. *Hayman* in reply stated that, having a conscience clear of any act unbecoming a gentleman and a head master, he must respectfully decline to comply with the request that he should resign, and he requested that the papers he then forwarded should be read and considered as a matter of justice to himself.

Then, on the 19th of December, the governing body met, and passed the resolution removing Dr. *Hayman* from his office of head master, such removal to take effect from the 7th of April next. This was communicated to Dr. *Hayman* by the Bishop of *Worcester*, who informed him that the step which had been taken by the governing body was not based simply on the matter of the dismissal of Mr. *Sidgwick* and Mr. *Smith*, and he added that the occurrences of the last two years at *Rugby* had given him much pain and grief.

Under all these circumstances, the Plaintiff contends that the resolution was invalid, and the bill asks for a declaration of its invalidity.

The real question is, whether this resolution is valid, and it must be so if it is the result of the fair and honest opinion of the governing body. Subject to the question of the construction of the Act, which I have already disposed of, it is admitted by the Plaintiff that no objection can be taken to any member of the body, except the Bishop of *Exeter* and Dr. *Bradley*. Can I attribute any improper motive to them? Their character and position render that all but impossible. If they took the course they did upon an honest conviction that it was right, and that it was not for the good of the school that Dr. *Hayman* should remain there, can I say that as members of the governing body they were not entitled to act upon that conviction? A man's scholarship may be perfect, his character admirable, and yet, for want of the power to control subordinates and govern boys, he may be wholly unfit for a schoolmaster. I do not attribute this unfitness to Dr. *Hayman;* on the contrary, I believe he would have succeeded in the management of this school if he had a fair chance, but that he has not had. Still the governing body is entitled to act on its own opinions, uncontrolled by this Court, if those opinions are fairly and honestly entertained, and I am unable judicially to come to the conclusion that they were not. It is to my mind plain that a state of things existed at *Rugby* in December last which made it imperative for the governing body to do something, or the school must have gone to destruction; whether it was proper to remove the under masters or the head master was for them—not, I think, for this Court—to determine. With them the Legislature has left the decision of that question, and so it must be left by this Court, unless I can see that the decision has been arrived at for some corrupt, improper, or collateral object. I am unable to see that any such objects have actuated the able and distinguished body of men who were parties to the resolution of the 19th of December last. If it had not been for the unfortunate parts taken by the Bishop of *Exeter* and Dr. *Bradley* in 1869, I am satisfied that the decision would not have been questioned by Dr. *Hayman* in this or any other Court. Therefore, apart from the question of the serious

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

charges contained in this bill, on principle I should come to the conclusion that I am not authorized judicially to interfere with the decision of the governing body.

But the bill contains charges of a very serious character. They are comprised in the 11th, 41st, 88th, 114th, and 135th paragraphs of the bill:—[His Honour read those portions of the bill.] I may simply recall that, in *In re Fremington School* (1), although three of the governing body out of the four had expressed themselves in writing, and pledged themselves to the guilt of the head master, Vice-Chancellor *Knight Bruce* did not, in that case, feel himself warranted on that ground in interfering with their decision. And as to the allegation that such a body of men as these, twelve in number, were overwhelmed and swayed by the Bishop of *Exeter* and Dr. *Bradley*, it is impossible to suppose that such a body of men were incapable of expressing a judgment of their own. Therefore I must treat those allegations as mere allegations of the pleader.

They can hardly be regarded as allegations of any fraudulent conduct. They amount only to strong charges of unfitness, and the cases referred to by Mr. *Cotton* are properly applicable to a case of such a kind where there are general charges.

The cases referred to were *Munday* v. *Knight* (2), a decision of Vice-Chancellor *Wigram* and *Gilbert* v. *Lewis*, before the Court of Appeal (3), and other cases of the same class, shewing that general charges of fraud not sustained by circumstances in the bill will not do, any more than a general charge that property is held on trust will do, as was decided in the case of *Grenville-Murray* v. *Earl of Clarendon* (4). There the allegation in the bill was that property in the hands of the Foreign Secretary was held in trust for the Plaintiff, and although there was a demurrer, the demurrer did not amount to an admission of the trust merely because the bill alleged it without stating any reasons.

Upon the whole, therefore, I am sorry to be obliged to come to the conclusion that this bill does not shew a case for the interference of the Court, and the demurrer, therefore, must be allowed. I am extremely sorry, because I think it is a grievous

(1) 11 Jur. 421; S. C. 10 Jur. 512.
(2) 3 Hare, 497.
(3) 1 D. J. & S. 38.
(4) Law Rep. 9 Eq. 11.

hardship to Dr. *Hayman;* but I am satisfied that a prolongation of this painful dispute, which would be the result of overruling the demurrer, would be of no benefit to him. I believe events have rendered the retention of his office impossible. I therefore allow the demurrer, but I do so without costs.

Mr. *Pearson* then asked for leave to amend.

This was opposed by counsel for the Defendants.

The VICE-CHANCELLOR:—I feel very much indisposed to give leave to amend, for I am satisfied that this dispute will never end in any good to Dr. *Hayman.* As I pointed out in the course of the argument, if the Court should ultimately overrule the decision of the governing body of the 19th of December last, if it is their settled conviction, and I cannot presume that such a body of men would have acted as they did unless they had a settled conviction that it is not for the benefit of the school that Dr. *Hayman* should remain there, they might meet again, and come to another resolution. It is impossible for this Court, when Parliament has put it so absolutely in the power of the governing body, to interfere. I repeat that according to the construction of the Act of Parliament, my opinion is, that every head master of a public school, that is, of the great public schools—for I believe every one of them is subject to this Act—that every head master is as much at the mercy of the governing body as a coachman is at the mercy of his master, and can be dismissed with or without reason; they are not obliged to give any reason whatever, and the Court must presume that they exercise their discretion properly, unless the contrary can be distinctly shewn. Therefore, in the interests of Dr. *Hayman* himself, if you will take my advice, you will let the matter rest. I have had the greatest possible regard to the interest of Dr. *Hayman* in the consideration I have given to this case, and I should gladly have given him relief if I thought I could have done so effectively, but I am so satisfied that in the existing state of things, whether by the amendment of this bill or any other course, he cannot obtain any good, that I am very reluctant to let the matter, as far as I am concerned, go any farther. Therefore I will consider that you do not ask me for leave to amend.

V.-C. M. 1874 HAYMAN v. GOVERNORS OF RUGBY SCHOOL.

The demurrer of the Bishop of *Exeter*, who was made a party as one of the governing body for the purpose of discovery, was also allowed. Both demurrers were consequently allowed, without costs.

Solicitors for the Plaintiff: Messrs. *Bower & Cotton.*
Solicitors for the Defendants: Messrs. *Iliffe, Russell, & Iliffe.*

V.-C. M. 1874 *April* 17.

PERRING *v.* TRAIL.

[1868 P. 169.]

Mortmain—Charitable Legacy charged on Land—Statutory Exemption from Disability—Power to devise implied from Power to take by Will.

6 Ch D. 205, 213

A hospital was empowered by an Act of Parliament by which it was incorporated, by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain land for the purposes of the charity; and also by will, gift, purchase, or otherwise, to obtain, acquire, hold, and maintain, for the purposes of the charity, any kind of personal estate, including money secured on mortgage or charged on land:—

Held, that those words implied a power to devise land for the use of the charity, and, therefore, that where a testator gave certain legacies to this as well as other charities out of a mixed fund of realty and personalty, the charity in question was entitled to receive the legacy in full.

JOHN PERRING, by his will, dated the 28th of August, 1863, gave, devised, and bequeathed all his real and personal estate whatsoever and wheresoever (except any estate vested in him as trustee or mortgagee) to trustees, upon trust that they, when and as they should deem expedient and an advantage so to do, with all the same discretion and authority as an absolute owner, sell his trust estate and effects, and stand possessed of the money to arise therefrom, Upon trust thereout, in the first place, to pay all his just debts, funeral and testamentary expenses, and then in payment of legacies to some relatives and connections, and also to several different charities, amongst which was a legacy of £100 to the treasurer for the time being of the *Westminster Hospital*; and there was a general direction that the several charitable legacies were to be applied by the respective treasurers to the purposes of the respective institutions.

The testator made some codicils which did not affect the bequest to the *Westminster Hospital*, and died on the 16th of May, 1867.

The suit was instituted for the administration of the testator's estate, and a decree was made on the 6th of March, 1868; and by the Chief Clerk's certificate the estate was found to consist of the proceeds of real and personal estate which had been sold and converted, and was represented by a fund in Court.

Several of the charities to which legacies had been given were incorporated by Act of Parliament, but in respect to all except the *Westminster Hospital* it was admitted that they were not exempted from the disabilities of the *Mortmain Act.*

The *Westminster Hospital*, however, was incorporated by a private Act of 6 Geo. 4, c. xx., sect. 1 of which, after constituting the president, vice-presidents, treasurers, and governors, for the time being, a body politic and corporate for the purposes of the institution or hospital by the name and style of "The President, Vice-Presidents, Treasurers, and Governors of the *Westminster Hospital*," with power to sue in the corporate name, enacted as follows:—

"And by the same name shall be able and capable, without incurring the penalties and forfeitures of the Statutes of Mortmain, to hold and retain for the purposes of the said hospital the said hospital or building in and near the *Broad Sanctuary* aforesaid, and piece of ground there whereon the same stands, and the piece or pieces of land or ground in *James Street* aforesaid, and by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain for the purposes of the said hospital any manors, messuages, lands, tenements, and hereditaments of any kind, name, quality, or sort, either in fee or for terms of life or years, or otherwise howsoever, so as such manors, messuages, lands, tenements, and hereditaments (exclusive of the said hospital at or near the *Broad Sanctuary* aforesaid, and piece or parcel of ground whereon the same stands, and exclusive of the said pieces or parcels of ground in *James Street* aforesaid, and also exclusive of the manors, messuages, lands, tenements, and hereditaments that may at any time or times after the passing of this Act be vested in the said corporation hereby created, or in any trustee or trustees for the said corporation hereby created, by way of mortgage, or upon which any

V.-C. M. 1874 PERRING v. TRAIL.

sum or sums of money belonging to the said corporation hereby created may be charged) do not in the whole exceed the clear yearly value of £20,000 over and above all charges and reprises, computing the same at the rack rent which might have been had or gotten for the same respectively at the time of the attaining or acquisition thereof: And also by will, gift, purchase, or otherwise, to obtain, acquire, hold, and maintain for the purposes of the said hospital any kind of personal estate, and any moneys and property of what nature or kind soever, including money secured on mortgage of, or charged upon, any manors, messuages, lands, tenements, or hereditaments."

The suit now came on for further consideration, the only question to be argued being whether the *Westminster Hospital* was entitled to receive the legacy in full.

Mr. *Glasse*, Q.C., and Mr. *W. W. Karslake*, for the Plaintiffs:—

The question is, whether a gift of land to a charity empowered to hold land is good where the testator is not also entitled to give land to a charity. There is a double disability, and powers such as those in the *Westminster Hospital Act* only remove the cause of invalidity arising from the disability of the charity, leaving the disability of the testator untouched: *Nethersole* v. *School for the Indigent Blind* (1); *Chester* v. *Chester* (2). Stronger words are necessary to take away the disqualification of a testator: *Robinson* v. *Governors of London Hospital* (3).

Mr. *W. S. Owen*, for the Defendants.

Mr. *Hull*, for some of the Charities, and Mr. *Cates*, for another, admitted that they could not claim exemption from the Mortmain Acts.

Mr. *Phear*, for the *Westminster Hospital*:—

The Act incorporating the hospital is so worded as to take away both disqualifications, and there are words in it which quite distinguish it from the cases cited. In the Acts incorporating the charities in *Nethersole* v. *School for the Indigent Blind*, and

(1) Law Rep. 11 Eq. 1. (2) Law Rep. 12 Eq. 444.
(3) 10 Hare, 19.

Chester v. *Chester* (1), there was simply a general power to take personalty by will and a limited power to hold land, without any words having reference to the sources from which it might be derived. It would be absurd to hold that the charity might take land by devise, and yet that no one had the power of devising.

Mr. *Glasse*, in reply.

The words of the Act must be read *reddendo singula singulis*, so as to avoid the conclusion that it was intended by a mere private Act to repeal *pro tanto* the Mortmain Acts.

SIR R. MALINS, V.C.:—

I agree with Mr. *Glasse*, to a certain extent, that the Court ought not to presume an intention to modify or repeal a public Act of Parliament by a private one. But words in a private Act must receive the same construction as in a public one, and this hospital having had those powers conferred upon it, is entitled to all the benefits arising from a fair construction of the enactment. It is clear that if no one could give any land to the charity by will, it could not take any land by devise, and could never become possessed of any. I think, therefore, that, in order to give the words of the Act any effect, I must hold that persons are at liberty to devise land for its benefit. A capacity to take by will conferred upon a charity seems necessarily to empower a testator to give land to it, and though the power is not conferred here in such express terms as was the case in *Robinson* v. *Governors of London Hospital* (2), I think the words are sufficient.

Solicitors: Mr. *F. H. Jeanneret;* Messrs. *Fladgate, Clark, & Finch;* Mr. *Henry Cockle;* Messrs. *Trollope & Winckworth* Messrs. *Redpath & Holdsworth.*

(1) Law Rep. 12 Eq. 444. (2) 10 Hare, 19.

V.-C. M.
1874
Feb. 28

FELSTEAD *v.* GRAY.

[1873 F. 90.]

Rule as to Hearing Short Causes.

The Court laid down the following rule for hearing short causes:—The certificate of Plaintiff's counsel is a *primâ facie* ground for setting down the cause. The Defendant who has not consented may appear, and if he can shew any fair reason why it should not be heard as a short cause, it will go into the general list; but otherwise it will be heard without the Defendant's consent as a short cause.

In a suit by a Plaintiff claiming to be one of the next of kin of an intestate against the administrator (the Solicitor to the Treasury) the cause was heard short, and a decree was made, notwithstanding that the Defendant objected on the ground that a search was being prosecuted for documents which, if found, would prove the Plaintiff to be illegitimate.

THIS case came on as a short cause. The bill was filed by *Amelia Felstead*, alleging that she was one of the next of kin of *George Frederick Rose*, a tradesman, who died on the 21st of November, 1872, a bachelor and intestate, being possessed of personal estate of considerable amount, his effects being sworn under the value of £25,000. The intestate was never married, and died without leaving a parent, mother or sister, uncle or aunt, nephew or niece, and at the time of his decease it was supposed that he had left no next of kin, whereupon administration was granted to the Solicitor of the Treasury on behalf of the Crown.

One of the documents relied on to prove the kinship was a paper in which the intestate stated information from a relative, which, if correct, shewed the Plaintiff to be illegitimate. The cause had been set down as a short cause.

Mr. *Cotton*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff.

Mr. *Hemming*, for the Defendant:—

We object to this case being heard as a short cause, and the Plaintiff was so informed before setting it down. If it is necessary to state the ground for the objection, which I submit it is not, according to the practice, I may say that search is now being made abroad for documents, which, if found, will shew that the

Plaintiff has no interest in the estate, and we expect to learn the result of the search by the time that the cause comes regularly to a hearing. If a Plaintiff could have a common administration suit heard short against the will of a Defendant, it would be done in multitudes of cases, whereas in fact it is every-day practice that a decree in such cases can always be intercepted by a friendly suit, because it is only in such a suit that a hearing as a short cause can be secured.

Mr. *Cotton*, in reply:—

This cause has been set down as a short cause upon the certificate of counsel. The Plaintiff has shewn a *primâ facie* case, which is all that is necessary. No evidence or answer has been filed on the part of the Crown, and we ask only for an inquiry, who are the next of kin of the intestate.

SIR R. MALINS, V.C.:—

I always understood that if counsel certified a cause was proper to be taken as a short cause that was *primâ facie* enough, and it then lay on the other side to shew it was not a short cause. I do not think it is sufficient for a Defendant to say that it is not proper to be taken as a short cause, because that might put a discretionary power into the hands of any Defendant to prevent a cause which is obviously a short cause from being heard. The practice is laid down in *Daniell's* Ch. Pr. (1).

If the Court was now going to decide any rights, it would be a very good reason why the case should be postponed; but as the only decree asked is an inquiry who is the next of kin—the Plaintiff having, in my opinion, from the statements of her counsel, shewn a *primâ facie* case for inquiry—I cannot see why there should be any objection to this decree. If the documents referred to are forthcoming, the proper place to use them will be in Chambers, upon the inquiry who are the next of kin. The Attorney-General will appear upon every stage of the inquiry, and these documents will be used. If there is any delay in producing them, that delay will be in my Chambers. But if she is the next of kin, as she is now somewhat advanced in life, the sooner she knows her title the better.

(1) 5th Ed. vol. i. p. 836.

V.-C. M. 1874 FELSTEAD v. GRAY.

Therefore to allege that because documents have not arrived, which may never arrive at all, I am to refrain from making this decree as upon a short cause, is, in my opinion, a most futile proceeding.

Whilst I am upon this matter I may as well state what is the rule I shall adopt as to short causes. The certificate of counsel is a *primâ facie* ground for setting a cause down as a short cause. The Defendant who has not given a consent to the cause being heard as a short cause, appears upon it, and if he can shew the Court any fair reason why it should not be heard as a short cause, it will be put into the general list; but to say that no cause shall be heard as a short cause without the consent of the Defendant, would be putting a power into the hands of Defendants which I think would be liable to be, or might be, very improperly exercised. For instance, suppose an administration suit was instituted against an executor where actions are being brought, and the estate wasted by proceedings at law, and where it is the interest of all parties that the decree should be immediately made—suppose an obstinate and wrong-headed executor comes and says, "I will not agree to this cause being heard as a short cause," it might bring the estate into great trouble. Therefore the Court, in such a case as that, would take the matter into its own hands, and if it saw that the case was a proper one to be dealt with as a short cause, would deal with it. In this case I think the matter is perfectly proper to be heard as a short cause, and therefore I make the decree as asked.

Solicitor for the Plaintiff: Mr. *R. C. Trass.*
Solicitors for the Crown: Messrs. *Raven & Bradley.*

In re APPLETREEWICK LEAD MINING COMPANY.

V.-C. M.
1874
April 22.

County Court Appeal—Companies Act, 1867 (30 & 31 *Vict. c.* 131) *s.* 25—*Contract in Writing by Articles of Association—Registration.*

The owners of a mine worked on the cost-book principle formed a limited company by registration under the Companies Acts, 1862 and 1867, and signed the memorandum of association for the full number of £10 shares into which the capital was to be divided, in proportion to their respective interests in the mine, and a clause in the articles of association (which were duly signed) stated that it was agreed that the sum of £7 should be credited on each of their £10 shares, and that all their interests should vest in the company:—

Held, that this was a valid contract sufficiently registered under the 25th section of the Act of 1867.

THIS was an appeal from the decision of *W. T. S. Daniel*, Esq., Q.C., the Judge of the County Court of *Yorkshire*, holden at *Skipton*.

The case came on upon an application by the official liquidator of the *Appletreewick Lead Mining Company, Limited*, to place the name of *Osmond Rhodes* on the list of contributories as an original holder of seventy-five shares. The objection on the part of *Rhodes* was that the shares were fully paid up. The shares were £10 shares. They had been paid up in cash to the extent of £3; the other £7 was credited to each share as paid up; and the question was whether the £7 so credited was to be treated as equivalent in law to payment.

Previously and up to the formation of the company a body of persons, of whom *Rhodes* was one, had worked certain lead mines at *Appletreewick* in partnership, on the cost-book principle; and these persons, in April, 1870, agreed among themselves that a company, limited by shares, should be formed under the Companies Acts 1862 and 1867, with a capital of £12,800, divided into 1280 shares of £10 each. The 1280 shares represented the aggregate of the interests of the several partners, and *Rhodes'* proportion of this aggregate was ninety shares. *Rhodes* signed the memorandum of association for ninety shares, and each of the other partners signed the memorandum for his respective portion,

V.-C. M. 1874 *In re* Appletreewick Lead Mining Co.

so that by the memorandum the whole capital of £12,800, divided into 1280 shares, was subscribed for.

The memorandum of association stated the objects of the company to be, the searching for, getting, dressing, and converting into lead, and selling and disposing thereof, the lead ore, &c., under or within certain mineral grounds therein, at *Appletreewick*, in the parish of *Burnsall, Yorkshire*, and also in such other mineral ground as should from time to time be taken, leased, or held by the authority and for the purpose of the company; the acquiring by purchase or otherwise the interests or rights of the persons who then were or thereafter should be engaged in working such mineral grounds, and the doing of all such other things as were or might be incidental or conducive to the attainment of the above objects.

This memorandum was dated the 22nd of April, 1870. *Rhodes* and his co-partners, as between themselves, valued their interests and rights, which by the memorandum it was one of the objects of the company to acquire by purchase or otherwise, at £8960, a sum which would be represented by £7 a share on each of the 1280 shares subscribed for, this amount having been arrived at by reason of the market price of the shares in the old company being £7 at that time. The company did not adopt as their articles of association Table A in the Schedule to the Act of 1862, but filed special articles of association; these articles were dated the same day as the memorandum, namely, the 22nd of April, 1870, and were duly signed by *Rhodes* and all the other persons who signed the memorandum, that is, by all the persons who were partners in the cost-book company, and whose concurrence as vendors would be requisite to make a valid contract for sale to the limited company of those rights and interests which it was one of the objects of that company to acquire by purchase.

The 2nd clause of the articles of association was as follows:—

"The subscribers to these articles being the persons engaged in working the mineral grounds mentioned in the memorandum of association hereunto annexed at the date of the said memorandum, and interested in the said premises, and the plant, machinery, and materials in and about the same, in proportion to the number of

shares in respect of which they have respectively signed the said memorandum and these articles of association, it is hereby agreed that each of the 1280 shares into which the capital of the company is divided, shall be credited with the sum of £7 per share as paid up thereon; and in consideration thereof the interest of the said parties respectively shall by these articles be transferred to and vest in the company."

The company, through its directors, immediately took possession of the property thus contracted to be sold, and worked it up to the presentation of the winding-up petition on which the order was made—namely, the 25th of May, 1872; and in the meantime the £3 unpaid on each share had been paid up by six several calls, made at intervals between the 17th of May, 1870, and the 29th of August, 1871. On the 2nd of August, 1870, the ninety shares subscribed for by *Rhodes* were issued to him, and a certificate granted, which stated the sum paid up, including the £7 credited and the calls then made and paid. The shares subscribed for by each of the other persons who signed the memorandum of association were at or about the same time issued to them in like manner. In the share register each share serially numbered was credited in the first column with £7 "as paid up according to the articles of association; in column 2 and in other columns with the amount of cash calls as subsequently made and paid;" shewing by these figures distinctly that £10 on each share had been paid, and how the payment had been made or treated as made. On the 25th of April, 1871, *Rhodes* transferred five of his ninety shares to *William Cookson*, and on the 26th of October, 1871, ten others of the ninety shares to *James Fawcett*, both of whom purchased them as paid-up shares, and certificates were issued to them accordingly, retaining the seventy-five shares for which the official liquidator sought to place him on the list of contributories.

It was admitted that the only contract was what was contained in clause 2 of the articles of association. These were filed with the Registrar of Joint Stock Companies on the 7th of May, 1870, before the issue of the shares to *Rhodes*, which was on the 2nd of August, 1870.

V.-C. M.
1874
In re APPLETREEWICK LEAD MINING CO.

The case having been argued, the learned County Court Judge delivered judgment (1).

The question for the opinion of the Vice-Chancellor was, whether

(1) 1874. Jan. 16.

W. T. S. DANIEL, Esq., Q.C., County Court Judge:—

His Honour, after stating the facts of the case, continued:—The terms of the 25th section of the *Companies Act* of 1867 are loose, and not so clear in expression as would be desirable. It is difficult to say grammatically to what antecedent "the same" refers. I suppose it means to refer to the substance of the previous part of the sentence, and that the meaning is, that payment of the whole amount of the share is to be made in cash, unless by a contract in writing duly made and signed at or before the issuing of the shares it shall have been determined between the parties that payment, either in all or in part, may be made in some other defined manner. I am not aware of any case in which the language of the section has been criticised; but it is necessary, as it seems to me, to do so in this case, because, if "the same" referred "to the whole amount," which is the immediate antecedent, and that the whole amount not being payable in cash is to be paid in some other way than in cash, then the latter part of the section might be considered not to apply to a case like the present, where a part only is to be paid otherwise than in cash, and the remainder in cash; but I prefer not to adopt a construction which would make the clause operate capriciously and partially. *Cleland's Case* (Law Rep. 14 Eq. 387), before Vice-Chancellor *Wickens*, speaks of the clause as placing a particular and very arbitrary limitation upon this class of contracts—the allotment of shares—by introducing a rule which disables a company issuing shares from making a contract with an allottee such as it could otherwise have made, unless by a written and registered contract; and in that case the allottee was held liable for want of a written and registered contract, although the shares had been issued to him as fully paid-up shares, and he never intended to contract for or accept any other than paid-up shares. In this case *Rhodes* relies upon the 2nd clause in the articles of association as a written and registered contract sufficient to satisfy the requirements of the statute, and I am called upon to decide whether it is so or not. For the official liquidator it is argued that the contract contemplated by the statute is something distinct and separate from the articles of association, and that it must be in writing. Sects. 14, 15, and 16 of the *Companies Act*, 1862, shew that the memorandum of association must be accompanied by articles of association, and that the articles, whether special or those in Table A., shall be printed, bear the same stamp as if contained in a deed, and be signed by each subscriber, and attested by one witness at least. In the present case the articles of association were complete in all these particulars, and they would have been complete without clause 2.

The 25th section of the Act of 1867 does not require the contract to be separate from the articles of association. It requires it to be duly made, and to be filed at or before the issuing of the shares; and though it is required also to be in writing, and the articles of association are required to be printed, they are also required to be signed; and if there is otherwise no objection

the said *Osmond Rhodes* was liable to be made a contributory of the company in respect of the shares now held by him to the extent of the £7 credited as paid up.

V.-C. M. 1874

In re Appletree wick Lead-Mining Co.

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to the contract being contained in the articles of association, I think being there (though printed), the articles themselves being signed, that there is a sufficient writing to satisfy the statute, and as the statute does not require more than that a contract in writing should be made, and is silent as to its being separate from the articles of association, I do not feel justified in importing into the statute by construction a condition not to be found in it, and which is not necessary for its proper operation.

It was next argued that the statute requires a contract duly made, and that to the due making of a contract two parties are necessary, and especially to a contract for sale and purchase such as this is, there must be one person as vendor to offer, and another person as purchaser to accept; and in this case the same persons are both vendors and purchasers; that as vendors they fix their own price, and as purchasers they act in a fiduciary character as directors or agents for the company, and that this conflict of duty and interest renders it impossible that there can have been a contract duly made within the meaning of the statute. The formation of the company, and the offer and acceptance of the contract, it is argued, are simultaneous acts, and done with the same persons: those who cause the company to come into existence by signing and registering the memorandum of association, and thus create a *persona* having legal capacity to contract at the same moment and as part of the same transaction, make the offer to the thing of their own creation, and then, as part of the same transaction, acting for this their offspring, who has no capacity at the time of acting for itself otherwise than through them, they as its agents and on its behalf accept the offer for it. This, it is argued, is the *reductio ad absurdum* of the contention, that there is a contract duly made, and that the principles of law as applicable to contracts recognised and applied either in Courts of Common Law or Courts of Equity, would, in ordinary transactions of sale and purchase between individuals *sui juris*, refuse to recognise such an anomaly. I do not consider myself at liberty to decide upon the weight or soundness of these arguments. The official liquidator, though he is acting for the interest of creditors, can only recover for them what the company could recover, and can only set up such a case as the company could set up. If the company is concluded, he, as representing creditors, is concluded also.

In *In re Duckworth* (Law Rep. 2 Ch. 580) Lord *Cairns* says: "The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced." This *dictum*, for it was a *dictum* only, was approved of by Lord *Westbury* and other Law Lords in the House of Lords in *Waterhouse* v. *Jameson* (Law Rep. 2 H. L., Sc. 29), and it was made the foundation of the decision in that case, though that was a case of fraud by the directors, which this is not, nor alleged to be. The utmost that can be said in this case is that the vendors sell to the company, represented by themselves, at their own price, and the company, through them, purchase at that price. There being

V.-C. M. 1874 *In re* Appletreewick Lead Mining Co.

Mr. *Glasse*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Bradford*, for the official liquidator in support of the appeal:—

The only question in this case is whether the contract entered into by these shareholders, of whom Mr. *Rhodes* was one, was a

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no suggestion of fraud, the case appears to me to be concluded by Lord Justice *Giffard's* decision in the case of *In re Baglan Hall Colliery Company* (Law Rep. 5 Ch. 354). That case, like the present, was a sale by the owners of a colliery to a limited company, of which they became directors, for a price to be paid in paid-up shares, and for which they had signed the memorandum of association. His Lordship says: "If there be a contract of such a nature, that on bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal." And again his Lordship says: "It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say they have nobody to agree with." I am bound by that *ratio decidendi*, and defer to it. As to creditors his Lordship says: "Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual, make inquiry into the state of his circumstances, and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. . . . If strangers, no misrepresentation being made, choose to deal with the company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability." This case was pressed upon me by the advocate of Mr. *Rhodes* and the advocates of the other shareholders in the same interest, and I am bound by its authority, and must implicitly follow it. I observe, however, that in that case, neither in the Court below, so far as I can judge from the judgment of the Vice-Chancellor as set out in a note (Law Rep. 5 Ch. 349–353), nor in the Court of Appeal, was any question raised as to how far the contract might be affected as to its validity by the circumstance that the vendors were directly before interested in its performance, nor has any such question been raised before me, nor if raised do I think, in the face of the *Baglan Hall* case, I could have allowed it to have any weight; neither can I allow my judgment to be affected by the circumstance which exists in this case and was pressed upon me, that a not inconsiderable number of creditors in this company are tradesmen who have supplied goods, being necessaries for the use of the mine, and working miners to whom wages are due for work and labour done at the mine. The law recognises no distinction of persons, and the judgment of Lord Justice *Giffard* points out very clearly what these persons should have done, and what inquiries they should have made before they supplied the goods or did the work. Any objection on their part, that if they had seen and read the memorandum of association, and the articles, and the register of shareholders, they could not have understood their legal effect, would be of no avail. *Ignorantia juris neminem excusat.* The protection which the law, in the spirit of equal justice, throws round the shareholders for the enjoyment of

contract in writing within the meaning of the 25th section of the *Companies Act*, 1867. The words are:—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a con-

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their rights, could not be allowed to be impaired through the ignorance of those who engaged in these dealings with the company. This argument would impugn the policy of the Acts, with which I have nothing to do.

On the argument before me a case before the Master of the Rolls, on the 14th of December, and noted in the *Weekly Notes* of the 28th of December (*Fothergill's Case*), was referred to, which, as noted, appears to have a bearing favourable to the official liquidator upon the question of the effect of a registered contract under the 25th section of the Act of 1867, upon the liability of a shareholder to pay in cash the amount of the shares for which he had signed the memorandum of association, and also had had allotted to him shares fully paid up in pursuance of a contract duly made and filed before the issue of the shares. I find, however, from a note in the *Solicitors' Journal* of the 4th of January, that that case is under appeal, and I should not feel justified in considering that decision as in any way diminishing the effect of Lord Justice *Giffard's* decision in the *Baglan Hall* case, so far as I consider it applicable to the case now before me. The result is that *Rhodes'* name will be struck off the list of contributories, and the same course will be taken as to all the other subscribers who now hold original shares. I think, however, for the reasons given by Lord Justice *Giffard* in the *Baglan Hall* case, namely, that persons who enter into a transaction of this nature must expect to have it strictly examined, that Mr. *Rhodes* and all others in the like condition should bear their own costs of this application, and the official liquidator will take his costs out of the estate.

As to transferees of shares—persons who stand in the position of *Cooke* and *Fawcett*, who bought from *Rhodes*—all those persons were *bonâ fide* purchasers for value of shares represented upon the certificates and transfers as fully paid up; and as none consented or desired to be put in the list of members, I ordered all their names to be struck off. The company have clearly no demand against them; some of them complain of having been deluded into buying shares at a high premium upon representations which have not been realised, and were anxious to state their grievance before me, but those were matters foreign to the company and the objects of the winding-up, and I declined to hear them or allow their complaint to be stated. I think, however, these persons, where they appeared separately from the subscribers, should be allowed their costs of the day's attendance out of the estate; but this order will not prevent any of the persons now struck off from being put on a list hereafter as members for the purpose of participating in any surplus. There still remains the cases of persons who are proposed to be put on the list as the holders of preference shares; but I understand the official liquidator does not propose to proceed with the case of those persons at present.

(1) W.N. (1872) 233.

V.-C. M. 1874 *In re* APPLETREE-WICK LEAD MINING CO.

tract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." We contend that this is not such a contract as was contemplated by the 25th section. In the first place it is evident that the policy of the Legislature was to prevent the issue of shares on any other terms than the payment of the whole amount thereof in cash, or for such consideration as should be in value equivalent to cash, for the whole nominal amount thereof. There is no evidence in this case to prove that the interests of the shareholders in the old company were equivalent in cash value to the amount of £7 per share on the shares allotted to them, or that the price per share as quoted in the public share list was a proper criterion of the value of the property as a whole. The Act says that the contract must be in writing and filed with the registrar. All that these shareholders did was to sign the articles of association, but there was no separate contract signed, and this is not, therefore, a compliance with the Act. The articles of association do not constitute a contract such as the Act must have contemplated, for they might be altered from time to time by the parties themselves, and by that means the articles would not be a contract binding upon the shareholders who signed it.

The question is, however, concluded by the authority of several cases. In *Cleland's Case* (1) it was held that a holder of shares allotted to him as "fully paid-up" was liable to be placed on the list of contributories unless he could shew that the shares were paid for in cash under the terms of the 25th section of the Act of 1867, and that the cancellation of a debt due from the company for service was not payment in cash within the meaning of that section. This was the cancellation of a debt due by the company for the land, and therefore not within the 25th section.

In *Pritchard's Case* (2) it was distinctly held by the Lords Justices that the articles of association did not constitute a contract in writing between the vendor of the mine and the company, within the 25th section of the *Companies Act*, and that the articles of association were simply a contract as between the shareholders *inter se* in respect of their rights as shareholders. The learned

(1) Law Rep. 14 Eq. 387. (2) Law Rep. 8 Ch. 956.

County Court Judge in deciding this question referred to *Fothergill's Case* (1), which was then noted only in the *Weekly Notes*, and was under appeal at the time, and on that account he did not consider himself bound by it, but since then that case has been affirmed on appeal by the full Court, and it was there held that *Fothergill* was liable to be placed on the list of contributories for the 1000 shares for which he had subscribed the memorandum of association, as shares on which nothing had been paid, although these shares were allotted in part payment of the purchase-money for the mine which was sold to the company by *Fothergill* and others.

Persons who enter into a transaction of this nature must expect to have it strictly examined, and unless they act in exact conformity with the statute they cannot claim exemption from the liabilities of other shareholders.

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the Respondent:—

As to the argument that the articles of association might have been altered by the shareholders themselves, and that consequently it was not a binding contract, if they had done so it would not have altered the effect of the contract, because it would not have been signed and registered before the issue of the shares. The articles could not have been altered so as to alter the position of the shares issued before such alteration took place. Either there is a contract in this case which is a compliance with the 25th section of the Act, or there is an agreement that payment for the property of the old company shall be made in a particular way. In either case the shareholders are exempted from liability as to the £7 per share. This is a case of certain persons having the ownership of a mine, and to protect themselves against unlimited liability they form a limited company under the Acts of Parliament. They divide the shares in proportion to the interests of the respective owners, taking the value at the then market price of the shares, and setting down that sum at £7 per share; they agree together that that amount is to be the purchase-money for the property, and then they fix the shares at £10 each, giving a sum of £3 to be called up for future expenses. All this was fully

(1) Law Rep. 8 Ch. 270.

V.-C. M. 1874 *In re* APPLETREE-WICK LEAD MINING CO.

explained in the articles, and any person looking at those articles, together with the shareholders' book, must see at once the position of the persons liable and the amount of their liability. The Act was intended, no doubt, to protect the public, that is, the persons who trusted the company in any manner, against imposition, by means of shares appearing to be *bonâ fide* shares when in fact they were fully paid-up shares. No such imposition could possibly arise in this case, and the public were given the means of ascertaining all they could require to know. The 2nd clause in the articles provides that each of the 1280 shares into which the capital of the company was divided should be credited with £7 per share as paid up thereon, and in consideration thereof the interest of the said parties respectively was by the articles to be transferred to and vest in the company. These articles were signed by all the shareholders, and they were duly registered; therefore a complete contract, such as the Act required, was effected.

This case is not governed by *Pritchard's Case* (1), for there no contract was entered into by the parties signing the articles of association. The 2nd of the articles in that case provided that the company should immediately after their incorporation enter into an agreement with the vendor of the mine for the purchase. It was only an authority to the directors to make a contract on certain terms, and not a contract in itself. Then, again, in that case there were to be other shareholders besides the owners of the property, and it was difficult for persons looking at the list of shareholders to connect the particular shares which might be found in *Pritchard's* name with the shares mentioned in the contract. But in this case all the shares were allotted to all the owners of the property, and there were no other shareholders, and from the terms of the contract it was impossible there should be any others. We have here a *de presenti* contract by which the owners give up their interest in the property in consideration of a certain sum amounting to £7 per share.

But supposing there should be any technical difficulty in holding this to be a contract within the words of the 25th section, then we say it is an agreement that cash, or an equivalent of cash, is to be paid for the shares, and that, independently of the

(1) Law Rep. 8 Ch. 956.

Act of 1867, brings the case within *Spargo's Case* (1), *Coates' Case* (2), and *In re Baglan Hall Colliery Company* (3).

There is here an agreement that payment for the shares shall be made in a particular way, that is, by the transfer of the property to the company. There has, therefore, been a payment in money, or in money's worth, which binds all the parties, and the articles explain exactly how the transaction was effected. The circumstances of this case very much resemble those of the *Baglan Hall* case, and the judgment of Lord Justice *Giffard* applies in every respect to this case. Then *Coates' Case* is exactly in point, and your Honour there decided that the transfer of the works by *Coates* to the company was equivalent to a payment of cash within the meaning of the 25th section.

Mr. *Glasse*, in reply:—

The object of the 25th section of the Act of 1867 was to put an end to such cases as this and the *Baglan Hall* case. Great abuses have arisen by persons being able by registering themselves as a limited company to escape all liability if the speculation turns out badly, and to reap the benefit of it if there should happen to be a profit derived. This was so in the *Baglan Hall* case, and the workmen who were engaged in the mine had nothing to look to but the property of the company, because all the shares were registered as fully paid-up. Nothing but a contract in writing duly signed is sufficient to enable the shareholders to escape liability. If the Act had intended that the articles of association should be a sufficient contract, it would have said "either by contract in writing or by the articles of association." The term "contract in writing," is several times repeated in different clauses in the Act, shewing clearly that a separate contract such as we all understand a contract in writing to be, was intended, and not a printed set of articles comprising all the regulations for the guidance and management of the association.

SIR R. MALINS, V.C.:—

This case comes on upon appeal from a decision of Mr. *Daniel*,

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 17 Eq. 169.
(3) Law Rep. 5 Ch. 346.

V.-C. M. 1874 *In re* APPLETREE-WICK LEAD MINING CO.

the County Court Judge of *Skipton*. It involves a question as to the liability of shareholders in a company to the payment of £7 more than the £3 which they have already paid. The case, which has occupied a whole day, has been very fully argued, and if I had not been able to come to a conclusion in conformity with the decision of the County Court Judge, I should have hesitated to decide without further consideration against the opinion of that learned Judge, for whose acquirements we all entertain the highest respect, but as I am able to come to a conclusion coinciding with his, I do not think it necessary to delay giving my judgment. The case is a peculiar one in this respect, that it is a company formed by the members of the old cost-book company, which was engaged in working certain lead mines at *Burstal*, in *Yorkshire*. It seems to have occurred to them that it would be more advantageous to turn their company into a limited liability company, and I agree with the arguments on behalf of the liquidator, that in such a case they were more particularly bound to act in every respect fairly, so as not to mislead those persons who might deal with them. But this is, I believe, the first case in which the memorandum of association has been signed for every share in the company, not only originally taken, but which could be taken; for they do not invite shareholders to come in, but on the contrary, the existing shareholders in the old company in forming themselves into a limited company take up among themselves all the 1280 shares which were to be allotted. Mr. *Rhodes* signed the memorandum as the holder of ninety shares, and his companions signed for the remainder of the 1280 shares of £10 each, which formed the whole of the capital of the company.

Now, that being the case, it was agreed that the property of the old company should become the property of the new company, and the market value of the old shares being then £7 per share, they agree that £7 should be considered as paid up, and that they should only pay up the remaining £3 per share. That is provided for by the 2nd of the articles of association, and upon the construction of that article the question now turns.

It is perfectly clear that if instead of framing the memorandum of association in the manner they did, they had provided that the shares should be £3 shares only, and that the property should be

taken as worth £7 per share, the matter would have been free from all objection, and that is in fact the substance of the agreement. But it is not the form in which they have drawn it. They have agreed that the nominal shares shall be £10 each, of which £7 is to be considered as paid up. Now, was there anything improper in this arrangement? What is the principle of limited liability? The object of the Legislature was to assist persons in trade in forming mining and other associations, so that the partners, instead of being liable to pay to the last farthing of their property, should be liable only for the amount of the shares taken by them; and provided the public have notice of that arrangement, no one dealing with them has any reason to complain of this limitation of liability. This system, however, was found to be subject to great abuses, and it was to remove these abuses that the Act of 1867 (31 & 32 Vict. c. 131) was passed, and by the 25th section of that Act it was provided, that every share in any company should be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same should have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Now, the argument is that this section has not been complied with, and that the contract to be filed with the registrar must be a separate contract, and not the contract contained in the articles of association. But this section was intended for the protection of the public, and in this case it is impossible that any one can be deceived, for each of the shares was credited not only in the books of the company, but in the register of shareholders, which every company is bound to keep for inspection, with £7 per share. It is said in the case for my opinion, that the said 1280 shares were, shortly after the registration of the memorandum and articles of association of the company, duly allotted to the persons who had signed the memorandum of association in respect thereof. Each of the shares, in pursuance of the arrangement in that behalf, referred to in the 2nd clause of the articles of association, was credited in the books of the company with the sum of £7 as having been paid thereon. In the share register of the company each of the said shares, serially numbered, was in the first money column thereof credited with

V.-C. M. 1874 *In re* APPLETREEWICK LEAD MINING CO.

the said sum of £7 as paid up, according to the articles of association, clause 2, and in other columns with the amount of each call as subsequently made, and paid certificates were also issued in respect of the shares, in which the sum of £7 was treated as having been paid upon each share, in addition to the amount of the calls actually made and paid thereon. Mr. *Rhodes*' name is entered as the holder of ninety shares, and he is credited with £7 per share, and afterwards with the calls made upon the shares and paid by him to the amount of the £3, which was the remaining sum due upon each share.

If these books had not been accessible to the public, that would not have been enough, but in the office of the company there is the share register, which may be seen by any person who has any dealings with the company, and there may be seen at once the amount with which the shares are credited, and the amount that remains to be called up.

Now, I will take the case of a man who is about to deal with this company. Suppose he is asked to give credit for goods to be delivered; he knows he is dealing with a company with limited liability, and that consequently he must look after his own interest and see what amount remains to be called up on the shares. Then he finds out from the registry that he is dealing with a company whose shares are all fully paid up in money; it is therefore clear that every one dealing with such a company, whether he trusts them with money or money's worth, knows he has nothing to look to but the property and the assets of the company. On looking at the registry, he says, how am I to get paid if the assets of the company are small, and the shares are all paid in full? He finds that *Rhodes* is a shareholder to the extent of £900, but is only liable to pay £270. Of all this he had notice when the goods were delivered.

The same thing occurs in the case of merchants who enter into a contract that goods shall be delivered, and that one of them is to be liable for one amount, and another for another amount. The person who supplies the goods has no reason to complain because he has to look to one man for part of his money, and to another for the other part, and one of them can pay, and the other cannot. Every man dealing with a limited company is bound to look into

these things before he delivers his goods. No doubt a grievous hardship is often occasioned to persons who through their humble position or insufficient intelligence do not avail themselves of these precautions, and are misled into giving their services on credit to a company; but there cannot be any exception made in favour of that class of persons. They are bound in all cases to look out for themselves.

My judgment in *Coates' Case* (1) has been appealed to, and this passage was read:—"In many cases common sense and propriety are utterly set aside on merely technical considerations. It is suggested here that there is a body of creditors to be protected, but these are transactions by which no creditor can possibly be deceived. Because although a creditor may originally look at the memorandum of association, what he really ought to rely on is the register of shareholders, kept in the office of the company; and Mr. *Coates* is entered in the register as holding only fully paid-up shares. They are not in terms stated to be paid up in full, but the form of the register is such as to shew that there is no liability to any further call."

So here the creditors could see that *Rhodes* subscribed for ninety shares of £10 each, and that he had paid up £7, and that the other shareholders had paid up so much of their shares, and it is for them to consider whether they will trust them or not. I can see nothing in favour of the case of the official liquidator—he appears as the representative of the creditors; but under the circumstances they have only themselves to blame if they have delivered their property to a company who have no means to pay them.

Then it is said there must be a separate contract in writing under the 25th section. Here there is a contract between the shareholders that each is to be the possessor of a certain number of shares, upon which they are to pay only £3, bringing in property to the value of the remaining £7. I am at a loss to see what harm this contract can do. Every shareholder in the old company signed the articles of association of the new company, and there was no one besides who could be required to sign, and there was no one else with whom they could contract.

(1) Law Rep. 17 Eq. 169, 178.

V.-C. M. 1874 *In re* APPLETREEWICK LEAD MINING CO.

The 25th section says that the contract is to be in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of the shares; but it does not require the contract to be separate from the articles of association, and the authorities do not shew that the contract must be distinct from and never can be contained in the articles. In this case the exception of these shares from greater liability than £3 appears as clearly as the constitution of the company.

The case of *In re Baglan Hall Colliery Company* (1) has been commented upon. That case first came before me. There was a body of persons carrying on mining operations, and they thought they would associate together as a joint stock company. The company was accordingly registered, and the memorandum of association was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests. Then the articles provided that the nominal capital of the company should be £25,000, divided into 500 shares of £50 each, but 400 only of such shares should be allotted. The whole of the shares were to be deemed to be fully paid up, and every subscriber was to be credited in the books of the company with the full amount payable in respect of his shares. I considered the effect of that to be that they could go on working the colliery without being liable to be called upon by any labourer or tradesman who supplied them with goods to pay a single farthing; so that they were to have the chance of making large profits, and if they gained they would have the benefit of such gains; but if losses, then they would lose nothing themselves. I considered that very unfair, and I directed their names to be put upon the list of contributories. My decision was reversed by Lord Justice *Giffard*, who sat as the sole Judge upon the appeal. It was, to my mind, an extraordinary decision, and if it had rested upon that decision—being the decision of one Judge only—I do not know that I should have considered myself bound by it, but it has since been approved of by the Lord Chancellor and the two present Lords Justices in *Fothergill's Case* (2). I am not, therefore, at liberty to act on my own opinion, and I must take that decision as a correct one, by which I am to be bound.

It is provided by the 2nd of the articles of association that each

(1) Law Rep. 5 Ch. 346. (2) Law Rep. 8 Ch. 270.

of the 1280 shares of the company shall be credited with £7 per share as paid up, and in consideration thereof the interest of the parties respectively shall by these articles be transferred to and vest in the company. In my opinion, after giving this distinct notice, and that being signed and registered with the Registrar of Joint Stock Companies that their shares were paid up, no one had a right to complain that they could only come upon the remaining £3.

Then it is said that I am bound by *Pritchard's Case* (1). That decision was in July, 1873, and if I could come to the conclusion that *Pritchard's Case* was the same as this, I should, of course, follow it; but that case has been fully commented on, and I do not think it is like this case. If it is used as a case laying down that under no circumstances can a contract which is to exonerate shareholders who have received shares fully paid up from still paying upon their shares, I do not think it goes to that extent; but where the circumstances are such that the contract could assume no other form, and it gives to the public all the information which they could have, I see no decision in that case that such a contract would be insufficient to satisfy the 25th section of the Act. The only object of the 25th section is that where there is an exoneration of the shares from payment, that exoneration should appear as distinctly as the company itself. Here it does appear most distinctly, because no one can know of the existence of this company without knowing each particular of its formation, and knowing that, there could be no reason to complain.

In *Pritchard's Case* the company was formed in the year 1870, to purchase and acquire the estate and interest of M. *de Thierry* in a concession of a tract of land in *Italy* to mine for ore and minerals. The articles of association provided that the company, immediately after their incorporation, should enter into an agreement with M. *de Thierry* for the purchase of the *Tavarone* mine for £2000, to be paid in cash, and an interest in the company to be represented by the issue of 3200 fully paid-up shares; such agreement to be made conditional on the sum of £5000 cash being actually paid up within three months from the date of the articles

(1) Law Rep. 8 Ch. 956.

V.-C. M. 1874 ~~ *In re* APPLETREEWICK LEAD MINING CO.

in respect of shares allotted and issued, irrespective of the said 3200 fully paid-up shares to be issued to M. *de Thierry*. Immediately after the incorporation the directors allotted to *De Thierry* and his nominees the 3200 shares purporting to be fully paid up, but the £5000 stipulated for by the articles was never paid up. The articles of association did not provide for the issue of these shares. It only provided that the company should enter into an agreement with *De Thierry*, which was to be conditional on the sum of £5000 cash being actually paid up within three months. The condition was never fulfilled, and no other contract was ever entered into between the company and *De Thierry* except that contained in the articles of association. The fatal objection was that the contract, which gave them permission to issue shares, was never registered; and in giving judgment, Lord Justice *Mellish* expressed concurrence in the decision of Vice-Chancellor *Wickens*, and said (1): "The articles of association cannot be considered as a contract in writing between *De Thierry* and the company for the sale of the mine to them. It may, no doubt, be the case if no other contract was entered into, and if *De Thierry* signed these articles, and they were acted upon, that a Court of Equity would hold that as between him and the company—from their acting upon it—there was a binding contract; but in themselves the articles of association are simply a contract as between the shareholders *inter se* in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree *inter se;* and the effect of the articles as respects the purchase of this mine was, in my opinion, simply to give to the directors authority to make a contract with *De Thierry* for the purchase of the mine on certain terms specified in the articles." Therefore he says what I am now saying, that where no other contract is entered into, then the articles of association may have the effect of doing what the Act requires. Then he further says, that the shares appeared to have been issued before, according to the terms of the contract, they ought to have been issued, and any person who looked at the articles, knowing that the proper amount had not been subscribed for and paid up, so as to make the purchase binding, might very well assume that these were some other shares, and not the paid-up

(1) Law Rep. 8 Ch. 960.

shares, to be allotted to *De Thierry*, and Lord Justice *James* said that in his opinion it was quite clear that the shares were never issued under the contract, and that the directors had no authority whatever to issue any of these paid-up shares except upon the completion of the contract. Therefore it was because the articles were a mere authority to purchase, and until the purchase was made there was no right to issue the shares, that the Lords Justices came to that decision.

In this case my opinion is that this is a contract in writing within the 25th section, and was duly registered; and as it gives to the public all the information which they are entitled to have, it is a contract which fulfils all that is required by the 25th section of the Act of 1867. I hold that the County Court Judge was right in considering that these shareholders could not be called upon to pay more than the £3 per share which they have in fact paid, and that they are not liable to be made contributories of the company.

I have only to add, that although as a general rule I should direct the costs upon an appeal from a County Court to follow the result, I think in this case it is right to order the costs to be paid out of the estate.

Solicitor for the Appellants: Mr. *Walter Webb*.
Solicitors for the Respondents: Messrs. *Torr & Co.*

V.-C. B.
1874
March 16.

DAWSON *v.* SMALL.

[1868 D. 20.]

Will—Charity—Honorary Trust—Gift of Surplus after void Gift.

5 Ch D 736 & 9 Ch D 577 580 20 Ch D 862

Testator bequeathed to his executors £600 out of his pure personal estate, upon trust to invest and apply the income in keeping in good repair all the tombstones and headstones of his relatives and himself in *G.* churchyard, and directed that any surplus that might remain after defraying yearly the expenses as before stated, should be given by his executors every year to poor pious members of the *Methodist Society* in *G.* above the age of fifty years:—

Held, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor, discharged from the obligation of keeping the tombstones in repair.

JOHN SMALL, who died in January, 1867, by his will, dated the 18th of June, 1846, after giving his dwelling-house and other property and cottages at *Guisborough* to the use of his housekeeper, *Sarah Dawson*, for her life, gave and devised unto the use of *David Baker* and *Robert Harrison* and *Sarah Dawson*, his housekeeper, their heirs and assigns, for ever, all his messuages, lands, tenements and hereditaments situate at *Guisborough*, and all other his real estates and personal estates, whatsoever and wheresoever situate, and of what nature or kind soever, which he might die possessed of, interested in, or in any way entitled to, and which he had any power to dispose of, either at law or in equity, for payment of debts, funeral and testamentary expenses. After a request to his executors and executrix that if he should die from home his remains might be brought to *Guisborough* to be buried amongst his friends, and with certain directions for preserving the bones and dust of his ancestors, testator bequeathed £600, arising out of such part of his personal estate as should not be secured upon mortgages or chattels real, or be invested in Government securities, to be invested either in the purchase of land in *Guisborough* or in its near neighbourhood; (but should the *Statute of Mortmain* prevent this), then the said sum of £600 to be invested in Government securities, and that the interest, dividends, or rent arising therefrom be for ever applied to the following purposes:—"1. To keep up in good repair all the tombstones and

headstones of my relations and self in the churchyard of *Guisborough*, with the wall and iron palisading surrounding the same; likewise the two headstones belonging to my family outside of the said inclosure; and if any of the iron or stonework want repairing that it always be done when wanted, and that all the headstones and tombstones always be kept clean and well painted, and that the letters be recut when growing illegible, and that all weeds and grass be kept from growing in the inside of the said inclosure, and that it be cleaned and scoured twice every year, and that likewise the headstones of my brother *J. Small*, in *Seamer* churchyard, and of my cousin *R. Wiles*, in the same churchyard, and of my cousin *Thomas Wiles*, in the inclosure of *Guisborough* churchyard, be kept in order and painted, the same as is directed respecting the others before named. And I hereby direct and desire that any surplus money that may remain after defraying yearly the expenses as before stated, shall be given every year, on the 6th day of September (my birthday), in the vestry belonging to the Wesleyan Methodist Chapel, in this town, to poor pious members of the *Methodist Society* resident in this town above the age of fifty years, and that the said surplus money be paid by the two society stewards belonging to the said chapel. Should there be more than two society stewards, a leaders' meeting shall be called, to choose two of the number, and whose decision shall be entered in a book to be kept for that purpose, wherein all payments from time to time shall be entered; and I do hereby order that they, the said society stewards for the time being, be the trustees to receive the dividends, rents, or profits arising from the investment of the said £600 sterling hereby bequeathed for that special purpose, and that the two society stewards retain to themselves the sum of £1 each annually as a remuneration for that trouble, and that the said sum of £600 be invested within eighteen months after my decease."

By a codicil to his will, testator directed that the distribution of the surplus interest of the £600 should be made by his executrix, *Sarah Dawson*, in her dwelling-house, instead of by the chapel stewards, in the Wesleyan Chapel at *Guisborough*, as directed by the will, the gift of £1 each for the stewards, for their trouble, being revoked.

V.-C. B. 1874 DAWSON v. SMALL.

A suit having been instituted for administration of testator's estate, a question arose upon further consideration, whether, the prior gift for keeping the tombstones in repair being, upon the authorities, invalid, the gift of the surplus interest of the £600, after satisfying that purpose, failed also.

Mr. *Swanston*, Q.C., and Mr. *J. Cutler*, for the Plaintiffs, *Sarah Dawson* and *William Harrison*:—

There is a present immediate gift of £600 for the benefit of the Wesleyan poor, subject only to the condition of keeping in repair the family tombstones. That prior condition being void as a perpetuity and incapable of being enforced, *Rickard* v. *Robson* (1), *Hoare* v. *Osborne* (2), *Re Rigley's Trust* (3), the bequest to the Wesleyan poor does not fail from being the bequest of a surplus or residue after a void bequest; but the whole fund is well given for the benefit of the Wesleyan poor, discharged from the honorary obligation of keeping the family tombstones in repair: *Fisk* v. *Attorney-General* (4); *Sinnett* v. *Herbert* (5); *Hunter* v. *Bullock* (6).

Mr. *Hemming*, for the Attorney-General, also contended that the £600 was well given for the benefit of the Wesleyan poor.

Mr. *Eddis*, Q.C., and Mr. *Torriano*, for the Defendants interested in remainder:—

Where there is a gift for a purpose which is void and incapable of being carried into execution, a gift of the surplus is also void for uncertainty: *Chapman* v. *Brown* (7); *Fowler* v. *Fowler* (8), inasmuch as it is incapable of being ascertained, except by the actual execution of the prior purpose: *Limbrey* v. *Gurr* (9). Moreover, the whole income would have been exhausted in keeping all the graves mentioned in repair, and therefore any inquiry for ascertaining the amount of surplus would be useless: *Cramp* v. *Playfoot* (10). The case is distinguished from *Fisk* v. *Attorney-General* and *Sinnett* v. *Herbert*; as in those cases there was a valid prior gift of the whole fund to trustees to be applied for certain purposes, some of

(1) 31 Beav. 244.
(2) Law Rep. 1 Eq. 585.
(3) 15 W. R. 190.
(4) Law Rep. 4 Eq. 521.
(5) Ibid. 7 Ch. 232.
(6) Law Rep. 14 Eq. 45.
(7) 6 Ves. 404.
(8) 33 Beav. 616.
(9) 6 Madd. 151.
(10) 4 K. & J. 479.

which were valid and others invalid. We submit, therefore, that the gift wholly fails, and that the £600 falls into the residue.

Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for other parties in the same interest.

SIR JAMES BACON, V.C.:—

I think this case is governed by *Fisk* v. *Attorney-General* (1), and that the decision in that case not only binds me but guides me to the decision of this case. It has been argued as a distinction that in that case and in some others there has been a gift to individuals. Here the testator disposes of the whole of his estate, names executors, and gives £600, part of his property, to be invested and secured. What is that but a gift to the executors? What are they but trustees under that gift? What difference, I ask myself, can it make that a person is named to have the management and conduct of that gift, and that it is given to be disposed of by the executors of the testator? There is no sort of distinction. The cases that have been referred to, beginning with *Chapman* v. *Brown* (2) and *Limbrey* v. *Gurr* (3), are wholly distinguishable; they are as plain as anything can be. The gift in each of those cases was of surplus. In one case it would be impossible to ascertain what would be required to build the chapel, and unlawful, if it could be ascertained, to apply the surplus for that purpose, and therefore it would be impossible to say that there would be any surplus. The same observation applies in *Limbrey* v. *Gurr*. The testator intended to dedicate a part of his property to the building of almshouses, and all that was not wanted for building the almshouses was to be given to the inhabitants of the almshouses. If the almshouses could not be built, there would be no persons who could now inhabit them. So in this case the testator sets apart £600 for the charitable purposes which he mentions, one of which is for repairing the tombstones, not saying anything as to the proportion which should be disposed of in that way, and he gives all the surplus for the poor people attending the Methodist Chapel of which he was a member. Where is the difference? Nothing is required for maintaining the

(1) Law Rep. 4 Eq. 521. (2) 6 Ves. 404.
(3) 6 Madd. 151.

V.-C. B. 1874 DAWSON v. SMALL.

tombstones; all that there is is surplus. It is exceedingly like *Fisk* v. *Attorney-General* (1), as I understand that decision, and in the present case, as I understand the rule, the obligation, if it may be so called, is discharged. It is an obligation either to be performed or not, as the persons to whom the custody of the money is given think fit, and all that is yielded from the annual income of the devised estates goes therefore to the charitable purposes which the testator has pointed out. The obligation to keep up the tombstones is merely honorary; but the obligation to give all that is not applied for the purposes first mentioned in favour of these poor people, is by no means honorary; it is a trust that must be executed.

In my opinion, consistently with all the cases referred to, and being wholly unable to find any distinction between *Fisk* v. *Attorney-General* and the present case, the gift of £600 is a good charitable legacy.

Solicitors: Messrs. *Pitman & Lane*, agents for Messrs. *Weatherill & Lloyd, Guisborough;* Messrs. *Bell, Brodrick, & Gray;* Messrs. *Shum, Crossman, & Crossman*, agents for Messrs. *Kidson, Son, & McKenzie, Sunderland;* Messrs. *Raven & Bradley.*

V.-C. B. 1874 March 17, 18.

PAGET *v.* EDE.

[1872 P. 119.]

Mortgage—Foreclosure—Lands out of Jurisdiction.

A foreclosure decree being a decree *in personam* depriving the mortgagor of his personal right to redeem, the Court has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land in one of the colonies.

ICPD 51
6 QBD 356
7 App Cas 236
23 Ch D 748

THIS was a bill by the assignees in bankruptcy of the mortgagee of a plantation and estate in the Island of *Nevis, West Indies*, praying an account of what was due for principal and interest upon the mortgage, and in default of payment a foreclosure against the Defendants and all persons claiming under them; and (if necessary or proper) the appointment of a receiver.

(1) Law Rep. 4 Eq. 521.

By an indenture of mortgage dated the 25th of October, 1845, after reciting that *J. B. Ede* (the mortgagor), being in want of money for the cultivation of his plantation or estate in *Nevis*, had applied to *William Adam* to advance the same, which *Adam* had agreed to do upon having the same and such further advances as thereinafter mentioned secured to him with interest by a mortgage of the property, and that in order to induce *William Adam* to make such advances *Eleanor Mary Ede*, since deceased, and *Charlotte Ede* (parties to the mortgage deed) had agreed to postpone the payment of a charge upon the estate of £2503, created by their father's will to and in favour of *William Adam*, and to give priority to the moneys thereby to be secured, the property therein described was assigned by way of mortgage unto *William Adam*, his heirs, executors, administrators, and assigns, with a proviso for the redemption thereof if *J. B. Ede*, his heirs, executors, administrators, or assigns, should pay unto *William Adam*, his heirs, executors, administrators, or assigns, in *Lincoln's Inn Hall*, the sum of £684 14*s.* 10*d.* (the amount at that time due to *Adam*) on the 25th of October, 1846, with interest at the rate of 5 per cent., and also all such other sum and sums of money as *William Adam*, his executors, administrators, or assigns, should or might thereafter lay out, pay, or advance for the purchasing or providing cattle or stores for working and improving the said plantations and estates, or for the repairing or making good any damages that might be done thereto by hurricanes, fire, or domestic or foreign enemies, or otherwise, to the use or upon the account of *J. B. Ede*, his heirs, executors, administrators, or assigns, with interest for the same respectively at the rate aforesaid. The mortgage deed also contained a covenant by the mortgagor, during the continuance of the mortgage security and until the principal and interest should be paid off, to consign every year all the sugar and other produce of the plantation (except so much of the same as should be necessary for payment of the taxes) to such persons as *William Adam* should appoint for the purpose of selling the same, and applying the proceeds in payment of all charges and expenses, of interest, and in reduction of principal.

The mortgage deed was duly inrolled and recorded according to the laws of the Island of *Nevis*.

V.-C. B. 1874 PAGET v. EDE.

The mortgagor, *J. B. Ede*, continued in possession of the property, and remitted to *Adam*, as consignee, divers moneys arising from the working of the estate, but these remittances were, as it was alleged, at no time sufficient to cover the advances made by *Adam*; and in April, 1854, the balance stated to be due to *Adam* was £2983 3*s*. 4*d*. On the 12th of June, 1854, *Adam* was adjudged bankrupt, and the Plaintiffs represented by transmission his official and creditors' assignees. Some arrangement was made between the assignees and the mortgagor in 1854, and payments at irregular times continued to be made for about ten years. In May, 1870, the assignees made formal application for payment of the mortgage debt. The mortgagor pleaded extreme poverty, but promised in the following August to remit £100, or more if possible; and that on the death of his aunt (then aged eighty-six) the whole amount due to *Adam* would immediately be paid off. This promised payment not having been made, the Plaintiffs, in April, 1872, commenced an action against the mortgagor, to which he pleaded the *Statute of Limitations*. Proceedings were also taken against him in Bankruptcy; and in June, 1872, the Plaintiffs filed this bill for the purpose of foreclosing the mortgage.

The defence raised by the answer was, that under the mortgage deed *Adam* was not entitled to recover or receive from the mortgaged property more in all than £1990 and interest at 5 per cent.; that before the date of his bankruptcy he had, by means of the consignments, received much more than this amount; and that any payments made by the Defendant *J. B. Ede* to the assignees were not in discharge or in part discharge of moneys owing on the security of the mortgage deed, but in respect of advances made by *Adam* independently of such security.

On the trial of the action in the Common Pleas, on the 19th of February, 1874, in spite of the contention on behalf of the Defendant, that inasmuch as a large portion of the moneys had been advanced for the private use of the Defendant *J. B. Ede*, and not for the cultivation of the estate, they could not be recovered under the deed, even if within the limit of £1990, and that any advances beyond that amount were simple contract debts of *J. B. Ede*, and as such bound by the *Statute of Limitations*, a verdict was returned for the Plaintiffs for the full amount claimed (£3977 17*s*. 5*d*.),

Mr. *Kay*, Q.C., and Mr. *G. W. Lawrance*, for the Plaintiffs:—

A decree in a foreclosure suit is merely a decree *in personam*, and can, therefore, be made by this Court, provided the mortgagor is within the jurisdiction, although the mortgaged property is not situate in *England*. *Toller* v. *Carteret* (1) is directly in point. The bill there was filed by the mortgagee for foreclosure of the Island of *Sark*, and the Defendant pleaded that *Sark* was part of the Duchy of *Normandy*, and had laws of its own, and was not under the jurisdiction of the Court; but the plea was overruled, "because the grant was of the whole island; and, secondly, that the Court of Chancery had also a jurisdiction, the Defendant being served with the process here, *et equitas agit in personam*, which is another answer to the objection." The cases are collected in *Penn* v. *Lord Baltimore* (2), and it is established that "with regard to any contract made or existing between persons in this country respecting lands in a foreign country, particularly in the British dominions, the Court will hold the same jurisdiction as if they were situated in *England*;" and, with more particular application to the present case, "There is no doubt of the jurisdiction upon contracts as to land in the *West Indies*, if the persons are here:" *Jackson* v. *Petrie* (3); and again, "Bills are often filed upon lands in the *West Indies*. The only distinction is, that this Court cannot act upon the land directly, but acts upon the conscience of the person living here:" *Lord Cranstown* v. *Johnston* (4); *Lord Arglasse* v. *Muschamp* (5); *Fryer* v. *Bernard* (6). So also a bill by one of the parties in *England* to wind up a partnership in *Hayti* has been entertained: *Maunder* v. *Lloyd* (7).

[The argument upon the construction of the deed is omitted.]

Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for the Defendant *Charlotte Ede*:—

We dissent from the proposition that a foreclosure decree is merely a personal decree. Inasmuch as it deprives the mortgagor of his estate, and operates to vest that estate, the thing itself, in

(1) 2 Vern. 494.
(2) 1 Ves. Sen. 444; Tu. L. C. vol. ii. 3rd ed. 853.
(3) 10 Ves. 164.
(4) 3 Ves. 170.
(5) 1 Vern. 75.
(6) 2 P. Wms. 261.
(7) 2 J. & H. 718.

V.-C. B. 1874 PAGET v. EDE.

the mortgagee, it is a direct proceeding *in rem*. It is a decree *in personam* in form only, the gist and essence being in the consequences, which are, that if the mortgagor do not pay, the estate will be taken out of him and transferred to the mortgagee, and his equity of redemption will be divested and annihilated. The incidents of an equity of redemption are wholly inconsistent with its being a mere personal right. It "constitutes an equitable estate in the land from the moment of making the mortgage, although it be not yet forfeited, for the equity of redemption is regarded in Courts of Equity as a continuation of the old ownership, the mortgagee holding the estate only as a pledge for the money, in the repayment of which he is principally interested:" *Burton* Comp. (1). It has been described sometimes as an estate; it is assignable and devisable; "passes by transfer and devise; may be impressed with, and then becomes subject to, the ordinary consequences of entails and other limitations; devolves, according to the tenure of the actual estate, upon the real or personal representatives of the owner; and is subject to gavelkind, borough English and other customs which affect the ordinary legal ownership:" *Fisher*, Mortg. (2). It is also recognised by Parliament as an equitable estate or interest in land, and not as a mere personal right: *Dower Act* (3 & 4 Will. 4, c. 105), s. 2; *Jones* v. *Jones* (3). With the exception of *Toller* v. *Carteret* (4), which is not very intelligibly reported, and may have been decided upon the notion that there was no Court in *Sark* having jurisdiction over mortgages, no single instance can be produced of a foreclosure decree over lands in the *West Indies* or out of the jurisdiction and it is distinctly laid down in *Norris* v. *Chambres* (5), that if an estate in a foreign country is mortgaged to an Englishman the Court will not administer as between those persons the law obtaining in *England* with relation to mortgages, by making a decree of foreclosure or directing a sale of the foreign estate if payment be not made of the amount due. Lands in the plantations and colonies, which are governed by their own local laws, are no more under the jurisdiction of this Court than lands in *Scotland* or any foreign country:

(1) Page 458.
(2) Page 264, 2nd Ed.
(3) 4 K. & J. 361.
(4) 2 Vern. 494.
(5) 29 Beav. 246, 255; 3 D. F. & J. 583.

7 Jur. N.S. 579, 689

Roberdeau v. *Rous* (1). So also the Court will not interfere to decree a partition of lands in *Ireland: Carteret* v. *Petty* (2); nor direct an issue to try the validity of a will of lands in one of the colonies, which have distinct local laws of their own: *Pike* v. *Hoare* (3).

[The VICE-CHANCELLOR:—If all these questions of jurisdiction and conflict of laws arise, why was not the objection taken by plea?]

If a plain defect of jurisdiction, though submitted to by answering, appears at the hearing, the Court will no more make a decree than when a plain want of equity appears: *Penn* v. *Lord Baltimore* (4). Moreover, the bill asks for a receiver also, which may unquestionably be granted over lands abroad: *Seton* on Decrees (5). But the appointment of a receiver is a remedy *in personam*, arising out of the negative contract between mortgagor and mortgagee, and tantamount to an injunction restraining the mortgagor from receiving the rents; and the only remedy for any interference with the receiver would be the personal order of committal for contempt. This is supported by another case mentioned in *Seton* (6), where that part of the order by which, after the appointment of a receiver of estates in *Ireland*, the tenants were directed to attorn, was held to be bad. The case is distinguished from *Penn* v. *Lord Baltimore* and the cases therein cited, as there was an agreement to do something, some personal contract or some trust affecting lands in a foreign country, which gave the Court jurisdiction, and could be enforced against the party resident in *England: Earl of Kildare* v. *Eustace* (7). *Maunder* v. *Lloyd* (8) was a personal contract, capable of being enforced in this country, and in *Lord Cranstown* v. *Johnston* (9) the jurisdiction of the Court, the case being one of fraud, was "upon the conscience of the party living here." The power assumed in *Lord Arglasse* v. *Muschamp* (10) and in *Fryer* v. *Bernard* (11) of granting a sequestration

(1) 1 Atk. 543.
(2) 2 Swan. 323, n.; 2 Ch. Ca. 214 (nom. *Cartwright* v. *Pettus*.)
(3) 2 Eden, 182.
(4) 1 Ves. Sen. 444.
(5) Page 1038.
(6) Page 1007 (*Re Trant*, 14 Nov. 1857).
(7) 1 Vern. 419, 422.
(8) 2 J. & H. 718.
(9) 3 Ves. 170.
(10) 1 Vern. 75.
(11) 2 P. Wms. 261.

V.-C. B. 1874 PAGET v. EDE.

against the estates of a defendant situated in *Ireland*, proceeded upon a ground now untenable, viz., the superintendent power of the Courts of this country over those in *Ireland*: *Lord Portarlington* v. *Soulby* (1). The provision for payment of the principal money in *Lincoln's Inn Hall* is a personal covenant by the mortgagor, which cannot give the Court jurisdiction to make a decree affecting the land locally situate abroad.

Mr. *Jackson*, Q.C., for *J. B. Ede*, submitted that the subject-matter of the suit being land out of the jurisdiction, the *lex loci rei sitæ* must govern the case, and that the Court, not being acquainted with the law of *Nevis*, could not interfere.

Mr. *Brodrick*, for the trustees of a term.

Mr. *Kay*, in reply:—

Upon the question of jurisdiction, *Toller* v. *Carteret* (2), *Lord Cranstown* v. *Johnston* (3), both cases of suits relating to land out of the jurisdiction, are distinct authorities that the Court will not decline to act. The case is different from a partition suit, which is a proceeding *in rem*, and in which the land has to be divided by metes and bounds. Even treating *Nevis* as a foreign country, the mortgage was in every respect an English mortgage, being made between parties at the time and now domiciled in *England*, and so long as the Defendants reside in this country the decree would be carried out by restraining them from instituting any suit in *Nevis* to redeem. All that the *dictum* of Lord *Romilly* in *Norris* v. *Chambres* (4) implies, is, that if a domiciled Prussian mortgages his estate in *Prussia* to an Englishman, the rights of the Englishman as mortgagee cannot be enforced in this Court. Lord *Campbell* (5), on appeal, observes that on the authority of *Penn* v. *Lord Baltimore* (6) the Plaintiff would have been entitled to succeed if he could have proved that the claim for a declaration of lien on the foreign property was founded on any contract or privity between him and the purchasers of the property; but his Lordship agreed in thinking with the Master of the Rolls that the

(1) 3 My. & K. 101–109.
(2) 2 Vern. 494.
(3) 3 Ves. 170.
(4) 29 Beav. 246, 265.
(5) 3 D. F. & J. 583, 584.
(6) 1 Ves. Sen. 444.

Plaintiff had failed to shew any such contract or privity. It is well established that the English Chancery, if according to its own rules it has jurisdiction over his person, will, when a special equity can be shewn, similarly compel or restrain a party as to land situate out of *England*, although a similar equity may not exist by the *lex situs*: *Westlake's* Private International Law (1).

SIR JAMES BACON, V.C.:—

Upon the point as to the jurisdiction of the Court which has been argued, it is said that as no instances are referred to of a decree for foreclosure of land in one of the colonies, therefore, the Court has no jurisdiction to make such a decree. One instance is referred to, and if I were to refer to my own recollection, which is very likely imperfect, I should have said that there have been many such decrees. But whether there have or have not been any decrees up to the present time since the *Sark Case* (*Toller* v. *Carteret* (2)), I cannot for a moment doubt the jurisdiction of the Court, and the right of the Plaintiff to the relief he asks for in the exercise of that jurisdiction. The case is the plainest and simplest that can be conceived. The owner of an estate in *Nevis*, subject to a certain charge or incumbrance, together with the persons entitled to that charge or incumbrance, agrees to make a security by way of mortgage. The deed is executed, the legal estate passes to the mortgagee, the formalities which the law of *Nevis* requires in the way of registration are complied with, and the legal estate is clearly and plainly in Mr. *Adam*, who has become bankrupt, his assignees being the present Plaintiffs. Then what remains? The equity of redemption. It is said that that is an estate. But it is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a mis-application of terms to call an equity of redemption an estate in the proper technical legal sense. That it is a right is beyond all

(1) Pages 56–59. (2) 2 Vern. 494.

V.-C. B. 1874 PAGET v. EDE.

doubt—a right which may be enforced in this Court, and which is recognised by the record in this case. I am then threatened with this, that I know nothing about the law of *Nevis* (which is quite true—nothing judicially), and that I cannot make this decree because it may lead to inconvenient consequences, and to some conflict with the law of *Nevis*. I do not conceive the possibility of any such thing happening. If there were any foundation for the suggestion, it ought to have appeared in the pleadings. The decision of the Court ought to be asked upon the subject, and there is no trace of any such thing in the pleadings, but only a vague suggestion that this Court has not jurisdiction. As I am satisfied that it is a jurisdiction which has been very frequently employed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot entertain any doubt that the Court has a right as between the English mortgagor and the English mortgagee to enforce that personal contract between them, although one of the consequences of it may be to vest in the Plaintiffs the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption, I cannot hesitate for a moment in saying that the suit which is brought for the purpose of having the account taken, of realizing the estate if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thinks fit to do so, is properly brought in this Court. Upon the point of jurisdiction, there is, in my opinion, no reason whatever for doubt.

Upon the construction of the mortgage deed His Honour was clearly of opinion that it was a valid security for the balance which, on taking the account, should appear to be due, not exceeding £1990, with interest and costs of suit, and that the Plaintiffs' charge had priority over the claim of Miss *Ede* (in respect of the charge upon the property in her favour under her father's will); and that the usual foreclosure decree ought to be made against all the Defendants.

Solicitors: Messrs. *Lawrance, Plews, & Boyer;* Messrs. *Shum, Crossman, & Crossman.*

NEATE *v.* DENMAN.

V.-C. H.
1874
Feb. 23, 25.

[1874 N. 5.]

Demurrer—Bill by a Barrister against his Inn—Jurisdiction.

On demurrer to a bill filed by a barrister against his Inn, praying that the Society might be restrained from prosecuting an action on the bond executed by Plaintiff on being called to the Bar, and that such bond might be delivered up to the Plaintiff; and praying for a declaration that Plaintiff was entitled to retire from the Inn without undertaking not to practise at the Bar:—

Held, that the Court had no jurisdiction, and demurrer allowed.

THIS was a demurrer to a bill filed by *Charles Neate*, of *Lincoln's Inn*, barrister-at-law, against the executors of the late Lord *Denman* (the obligee of the bond given by the Plaintiff on being called to the Bar), and against Sir *W. M. James*, treasurer, as representing the *Society of Lincoln's Inn*.

The VICE-CHANCELLOR:—Mr. *Neate*, though I am not a Bencher, I am a member of *Lincoln's Inn*, and it will be for you to consider whether, under such circumstances, you will proceed with the case in this Court.

Mr. *Neate*:—As far as I am concerned, I waive all objection that may exist on that ground. It was because you were not a Bencher that the bill was filed in this branch of the Court.

The case then proceeded.

The bill contained the following allegations:—

The Plaintiff, in January, 1832, being then a member of *Lincoln's Inn*, was called to the degree of utter barrister. As a necessary condition to such call he was required, with his surety, to sign, and did sign, a bond to the then treasurers, Lord *Denman*, *Francis Burton*, and Viscount *Sidmouth*, in £200. The condition was in the following terms:—

"That if the Plaintiff should from time to time, and at all times thereafter during his life, or so long as he should continue a member of the *Society of Lincoln's Inn*, duly and orderly perform, pay, and discharge all such debts, duties, and charges, sum and sums of

V.-C. H. 1874 NEATE v. DENMAN.

money as should grow due and chargeable upon him for pensions, preacher, duties, commons, taxes, fines, penalties, amerciaments, and all other duties whatsoever thereafter to be due or imposed upon him by virtue of any order or orders of the said Society theretofore made, or at any time or times thereafter to be made, or by virtue of or according to the usage and custom of the said Society, then this obligation to be void, or else to remain in full force and virtue."

The bond was duly signed, sealed, and delivered by the Plaintiff and *Evelyn Bazalgette*, his surety. The Plaintiff was not then or previously informed that he could not withdraw from being a member of the said Society, and so escape from his liabilities under the bond, without the consent of the Masters of the Bench, and that such consent would only be given on the condition that he would cease to practise at the Bar. The Plaintiff did not believe that such consent was necessary, or that such conditions would be imposed.

In 1845 Plaintiff ceased to reside in *London*, and ceased to practise. The Plaintiff paid all fees claimed from him up to the year 1862, amounting to upwards of £60. About the year 1869, being desirous of terminating his liability, he requested the under-treasurer of the Society to inform him what was the form of notice or application to be given for that purpose, and he received in reply a petition, which he was required to sign and present, and which was as follows:—

"To the Worshipful the Masters of the Bench.

"The petition of *Charles Neate*, Esq., a barrister of the Society, sheweth:

"That your petitioner is desirous that his name may be taken off the books of this Society, as he is not now practising at the Bar, and it is his intention not to practise as a barrister in future either in this country or in any of the colonies. Your petitioner therefore prays your Worships will be pleased to take his name off the books of the Society, and order his bond to be cancelled on payment of all his arrears of dues and duties to the treasurer and the fine on leaving, within one month from the date of the order made hereon."

Since the time when such form of petition was sent to him the terms now required have been altered by the addition of the word "*India*" after "colonies," and by the substitution of the word "composition" for the word "fine," by which alteration, as Plaintiff believes, the Benchers meant to assert more plainly their right of retaining on their books their members for the term of their natural lives. The Plaintiff, as he believed, had never, or till very recently, when this petition was sent to him, seen a copy thereof. The Plaintiff believed the form to be illegal or objectionable, but partly to avoid litigation, and partly for the sake of his surety, who was one of the Masters of the Bench, he signed it and returned it to the treasurer. Thereupon shortly afterwards an order was made by the Master of the Bench as follows :—

At an adjourned council held the 15th of December, 1869, "upon the petition of *Charles Neate*, a barrister of this Society, praying that his name may be taken off the books, as he is not now practising at the Bar, and it is his intention not to practise as a barrister in future either in this country or in any of the colonies, it is ordered accordingly, and that his bond be cancelled on paying all his arrears of dues and duties and the customary fine to the treasurer of this Society within one month from the date hereof, or this order to be void."

The Plaintiff did not pay the amount within the month, and the order, therefore, became void.

In the 13th paragraph of the bill the Plaintiff alleged that he was still indebted to the Society in the amount of arrears due from him at the date of the petition, and the dues subsequently incurred, amounting only, in consequence of reductions since 1862, to £23 11*s.* 10*d.*

On the 17th of July, 1873, the executors of Lord *Denman* commenced an action against the Plaintiff in the Queen's Bench for the sum of £23 11*s.* 10*d.* Such action was brought at the request of Sir *W. M. James*, treasurer of the Society, by their usual solicitor. On the 18th of November, 1873, the Plaintiff wrote to the Defendants' solicitors offering to pay the amount claimed on being released without further condition from his bond; the solicitor, under the direction of the treasurer, declined to comply therewith, and intends

V.-C. H. 1874 NEATE v. DENMAN.

to proceed with the action, and to hold the Plaintiff liable on the bond for any dues that may accrue due. The Plaintiff still desires to cease to be a member of the Society, but the Masters of the Bench decline to take off his name, or to release him from his liability under bond, until he has signed and presented a petition in the altered form thereof. The Plaintiff refused, and still refuses, to make any such declaration of intention as that required of him, because it would be a restraint upon using any right he might otherwise have of practising as a barrister without being a member of the said Inn or some similar society, and because such declaration evidently intended to assert for the Inn, or Masters of the Bench thereof, the right of imposing such restrictions, and, therefore, the making such declaration a condition of withdrawal from the said Inn is contrary to public policy, and, therefore illegal, as restricting Plaintiff, or any person making the same, from practising in any part of the *United Kingdom*. The Plaintiff further charges that such condition is further contrary to public policy, as interfering with the right which our colonies or some of them have of regulating the practice of their own Courts. The *Society of Lincoln's Inn* is, and claims to be, a private association, and as such claims to exercise the uncontrolled right of admitting whom it pleases to be members thereof, and of administering or allowing the Masters of the Bench to administer, without publicity or accountability to any but themselves, the funds and property belonging to or to be held in trust for the said Society.

The said Society has at different times repudiated and successfully resisted the right of the Court of Queen's Bench to interfere with their proceedings by the process of mandamus, which right the Court of Queen's Bench would undoubtedly have if the said Society were a body corporate or politic or otherwise, claiming to exercise or to possess any public function or character. And the Plaintiff charges that even supposing that such monopoly of conferring the right of admission to the Bar might in some other form be useful and desirable, it is nevertheless contrary to public policy that such a monopoly should be enjoyed and made a source of revenue by a private and irresponsible association. The Plaintiff also charges that such monopoly is in fact a source of revenue or pecuniary advantage to the said Society, and more especially to the Masters of the said Bench. No grant of such monopoly, or

of any share therein, was ever in fact made by any charter or letters patent to the said Society, and even supposing, which the Plaintiff does not admit, that any such monopoly could be legally claimed on the ground of prescription by a body corporate or politic, the said Society, not having that character, and not being, nor having ever been, otherwise capable of receiving a grant in its collective capacity, is not capable of making a title to it by prescription. For the reasons herein appearing, the Plaintiff insists that he is entitled to be discharged from his liability under the said bond, and to have the same delivered up to him or cancelled on paying to the said Defendants or to the said Society the dues incurred by him up to the present time, which the Plaintiff has already offered, and hereby again offers to do, on delivery or cancelling of the said bond. The Plaintiff is further willing and hereby offers to pay all costs hitherto incurred by the said Defendants, *Richard Denman* and *George Denman*, in the said action, but as to the composition required of him in addition to the said dues, the Plaintiff desires to be informed of the amount of such claim and the grounds thereof. That the Defendant Sir *William Milbourne James* is the present treasurer of the said Society, and as such has the custody of the said bond and the petition hereinbefore mentioned, or otherwise power to cause the same to be delivered up, and is also as such treasurer well acquainted with the truth of the matters hereinbefore stated, or many of them, and ought to answer thereto.

The bill (as amended) prayed that the Defendants might make a full and true discovery and disclosure of all the matters aforesaid, and in the meantime that the Defendants (Plaintiffs at Law) be restrained from proceeding with the said action, and from commencing any other action, and that such of the Defendants as had the custody of the bond or petition might deliver up the same to the Plaintiff on payment by him of the dues and costs properly chargeable, and that it might be declared that the Plaintiff was entitled to retire from the Society of *Lincoln's Inn* without giving any undertaking not to practise as a barrister, or being subject to any condition against his practising as a barrister, and without being liable to the payment of any fine or composition on his retiring from the Society.

V.-C. H. 1874 NEATE v. DENMAN.

Mr. *Dickinson*, Q.C., and Mr. *Pemberton*, for the demurrer:—

The Plaintiff states in his bill that he has been called to the degree of utter barrister, but he has forgotten to add that it was barrister of *Lincoln's Inn*. To be a barrister at all, a man must be a barrister of some Inn of Court. He was called by the Benchers, who had no jurisdiction to do more than call a member to be a barrister of their own Inn. In ancient times, a member of an Inn desirous of obtaining the degree of barrister, was required to go through certain moots or exercises, and this was necessary to obtain that degree. The moment a member ceased to be a member of an Inn, he no longer had any right to practise as a barrister. And here is the real point between the Plaintiff and the Defendants. What he really seeks is that he may still practise at the Bar after he has ceased to be a member of the Inn. There is no precedent for this. The Inns of Court are private societies. Their origin is perhaps obscure, but their rights are well defined, and one of those rights is, that in the internal management of their affairs the decision of the governing body is supreme, subject only to an appeal to the Judges of the superior Courts of *England* as visitors of the Societies. Several attempts have been made to get out of this jurisdiction, but all have signally failed.

In *Cunningham* v. *Wegg* (1), it was held that a bill would not lie against the Benchers of an Inn of Court to obtain the renewal of a lease of chambers. Lord Chancellor *Thurlow* in that case said: "There is no instance of a suit either relative to the discipline or the property of chambers in an Inn of Court. The Defendants (*Gray's Inn*) say, as far as they have acted, they are liable to the jurisdiction of the Judges. It is a claim among persons having privilege, therefore this is not the proper jurisdiction." In *Rex* v. *Gray's Inn* (2), the prosecutor, one *Hart*, applied for a mandamus to compel the Benchers of his Inn to call him to the Bar, in answer to which the Inn alleged that he had been discharged under the *Insolvent Debtors Act*, and thereby disqualified. Lord *Mansfield*, in his judgment, stated that it was quite clear that the Inns of Court were not corporations, and that the prosecutor, if there was anything in his case, must apply to the Judges. A petition was ultimately presented to the Judges by *Hart* and dis-

(1) 2 B. C. C. 240, 241. (2) 1 Doug. 353.

missed. In *Rex* v. *Barnard's Inn* (1), a rule nisi, which had been obtained by an attorney against the principal and antients of *Barnard's Inn*, calling upon them to admit the applicant into their Society, was discharged on the ground that the Court (Queen's Bench) had no jurisdiction in the matter. The same principle was laid down in the case of *Rex* v. *Benchers of Lincoln's Inn* (2), where it was held that the Court would not grant a mandamus to compel the Benchers of one of the Inns of Court to admit an individual as a member of the Society with a view to his qualifying himself to be called to the Bar. There the applicant in person was obliged to admit he could not find any precedent in point. The case was decided on the ground that, so far as the Inns of Court were concerned, they were voluntary societies, not subject to the jurisdiction of the Courts. These authorities shew that the Court declines to interfere with the internal management of an Inn of Court. In fact there is no case where it has ever been done. The Plaintiff's position, therefore, is this: He has voluntarily joined a voluntary society, with full knowledge that it was governed by rules of its own, to which on becoming a member he assented; he has given the Society his bond conditioned for the payment of certain money, which by his bill he admits to be due, and for which he was sued at law. Were it necessary to rely on this point, it would be fatal to the bill. What equity could he have to be relieved from payment of money which he is obliged to admit was due? He has not made out any case of fraud, of mistake, or even for any account, and upon every ground, and especially on the ground of want of jurisdiction, the demurrer must be allowed with costs.

The Plaintiff appeared in person, and said he claimed to appear in the dress of his profession, though it was long since he had used it, because the question he intended to raise was on behalf of the profession.

The VICE-CHANCELLOR:—You need make no apology for appearing in your proper dress.

The Plaintiff:—The points which I intend to raise are these: that the monopoly now enjoyed by the Inns of Court depends

(1) 5 A. & E. 17. (2) 4 B. & C. 855.

V.-C. H. 1874 NEATE v. DENMAN.

entirely on the sufferance of the Judges, who have the power to admit to practise at the Bar persons other than members of the Inn, as, for instance, graduates in laws at the Universities; that the Judges possessed such power, delegated from the Crown, is shewn by *Dugdale's Origines Juridicales*. I shall further contend, and, I trust, satisfy the Court, that the pledge which the Society required me to give not to practise hereafter is a restraint on the liberty of the subject, and contrary to public policy.

The VICE-CHANCELLOR:—The first point on which I desire to hear you is as to the jurisdiction of the Court to entertain such a bill as this at all, because, if the Defendants are right, it would be a waste of time to go into the other part of the case.

The Plaintiff:—Then, on the question of jurisdiction, the first point that suggests itself is that none of the authorities which have been cited have any application to this case. With one exception they are all cases at law; and as to this one case, I say it could not be now maintained. I will first deal with the case of *Cunningham* v. *Wegg* (1), which is the only equitable decision that has been cited. That was a dispute about the right to the renewal of a lease of chambers in the Inn, the facts being that the property was vested in the Benchers, subject only to the revision of the Judges. In that case the Court held that it had no jurisdiction, even were the case maintainable. But what application has such an authority to the facts of this case? None whatever. Here the Plaintiff says: "You, the Defendants, induced me unwarily to execute a bond, ostensibly to secure the payment of certain sums payable to you while I continued a member of your Inn; but you now claim to use that bond for a purpose entirely foreign to the original object for which it was given, viz., to extort from me an undertaking not to practise at the Bar, in derogation of my rights. The Defendants have the bond in their possession, and refuse to deliver it up; and it is on that ground that I invoke the aid of this Court. It is an elementary principle in this Court that it will not allow an instrument obtained for one purpose to be used for another; and this is what the Court is now asked to prevent.

(1) 2 B. C. C. 240.

Again, if the Courts are not at liberty to intervene between the members of an Inn and the Bench, surely that is an additional reason why the Court should interfere to restrain this action. It was not the Plaintiff who appealed to the Courts in the first instance, but the Defendants themselves. With regard to the cases at Law, they have no bearing on the question; but, even if they had, they would not be approved in the present day. Will any one, for instance, contend that the decision of the Inn in the case of *Rex* v. *Gray's Inn* (1) would be supported, in which the Benchers refused to call a member to the Bar because he had taken the benefit of the *Insolvent Debtors Act?* Surely not. The truth is, that in the present day public rights are more recognised than formerly. Whatever, in very ancient times, they may have been, the Inns of Court now are public institutions, with public duties and obligations, which they are bound to discharge. It is said that the remedy is by appeal to the Judges, and further, that there is no analogous case to be found in the books. If so, it is because in no other case has an attempt like this been made by the Inns of Court. I submit, therefore, that this demurrer must be overruled.

SIR CHARLES HALL, V.C.:—

It appears to me that I have no jurisdiction to try the question raised in this case. Mr. *Neate*, no doubt is well aware of the difficulties which may arise between a member of an Inn of Court and the Inn itself with reference to the management of its property, because he has commented on the case of *Cunningham* v. *Wegg* (2). He says that decision cannot be maintained. But, sitting here as Judge of first instance, I could not do otherwise than follow it. However, I express no opinion on that case; my judgment in the present case not depending on it.

The jurisdiction of this Court, as well as that of a Court of Law, may in certain cases, and, indeed, must in some, exist in respect of property, even although an Inn of Court may be party to the litigation. But with such a case I am not dealing on the present occasion.

This is a case in which the question is between the Plaintiff and the Defendants, the latter of whom may, for the purposes of this suit, be considered as representing the Society of *Lincoln's Inn.*

(1) 1 Doug. 353. (2) 2 B. C. C. 240.

V.-C. H. 1874 NEATE v. DENMAN.

The question is simply and solely as to the position and rights of the Plaintiff as a member of the Society. He voluntarily became a member of it, and gave it a bond to pay certain dues during the whole of the time that he should be and until he ceased to continue a member of it. The condition of the bond contains no stipulations as to the mode or circumstances by or under which he should cease to be a member of the Society. That was left to the internal regulations of the Society itself, of which he had become, and still is, a member. Therefore, in that state of things, the right to retire from the Society which the Plaintiff claims is entirely a question between him and the Society. He says he has a right to retire. He does not say he has already retired and is not now a member, because, if he had said that, it would have been a defence to the action at law. He says he made a proposal to the Society to be allowed to retire from being a member of it, but that they refused to permit him to do so except on terms with which he says he is not bound to comply. That is a question entirely for the peculiar jurisdiction which has been referred to in the arguments, and which has always been recognised—namely, that of the Judges of the Superior Courts of *England*. They have the power of deciding such questions as the present. If the Plaintiff had no remedy by an appeal to the Judges, he might, and probably would have, a right to apply to the Court of Queen's Bench for a *mandamus*. That, however, would be because he had no other remedy. No case has been referred to in which a Court of Equity has interfered between the Benchers of an Inn of Court and a member of the same Society to restrain an action at law under such circumstances as the present. I consider that the judgments in the cases of *Rex* v. *Benchers of Lincoln's Inn* (1) and *Rex* v. *Gray's Inn* (2), although judgments of Common Law Courts, are binding on me, and prevent my entertaining any jurisdiction in this case. If there were no appeal to the Judges, there might be a right to a *mandamus*. I think I have no power to deal with the case.

It was said, however, that the claim to have the bond delivered up would of itself confer an equity on the Plaintiff. With reference to that, the rule of this Court is, as Mr. *Neate* knows, that the Court will not interfere if the invalidity of the instrument appears

(1) 4 B & C. 855. (2) 1 Doug. 353.

on the face of it. A document is, on the face of it, either legal or it is not. If it is illegal, it is inoperative, and there is, therefore, a valid defence at law with respect to it. If, on the other hand, it is legal, but the circumstances are such that the party cannot avail himself of them at law, then, if the case be, as this is, one between a Society and a member of it, with a proper forum to which to appeal—viz., the Judges,—this Court ought not to interfere; and this Court will not be induced to do so merely because the bill seeks the delivery up of the document. The Court's jurisdiction as to the delivery up and cancellation of documents is peculiar. The Court interferes in the case of bills of exchange and promissory notes, because they may be negociated; but this is inapplicable to a bond. I recently had to consider that in a case of *Binns* v. *Fisher*, in which I held that the Plaintiffs had not an equity to have delivered up to them a satisfied bond.

I have not made any observation on Mr. *Neate's* offer to pay the £23 11*s.*, and his admission that he might have had, as he no doubt has had, some benefit from being a member of the Society, such as the use of its library, and so forth. He does not rest his case on such offer; and, if he had done so, I think it would not have assisted him. Perhaps, I should say that any relief he may seek with respect to future actions against him he may embody in his appeal to the Judges.

His real case is to be found in the prayer added by amendment, for a declaration that he is entitled to retire from the *Society of Lincoln's Inn* without giving any undertaking not to practise as a barrister, and without being subject to any condition against his practising as one, and without being liable to the payment of any fine or composition on his retiring from the Society. I have no jurisdiction to make such a declaration, and the demurrer must be allowed.

The Plaintiff:—Does your Honour think this is a case for costs?

The VICE CHANCELLOR:—There is a general rule about the costs, and this case must follow the general rule.

Solicitors for the Plaintiff: Messrs. *Dobinson & Geare.*
Solicitor for Defendants: Mr. *Pemberton.*

V.-C. H.
1874
Feb. 14.

COPE *v.* EVANS.

[1872 C. 60.]

Trade Mark—Infringement—No Evidence of Deception—Degree of Likeness.

Bill by traders, praying for a declaration of their right to a certain trade mark, and for an injunction to restrain Defendants from using a brand alleged to be an imitation of it, dismissed with costs, there being no evidence of actual deception, and no such imitation of the Plaintiffs' trade mark as, in the opinion of the Court, made deception probable.

Seixo v. *Provezende* (1) discussed.

THE Plaintiffs were cigar manufacturers in *Liverpool*, and the Defendants carry on the same trade at *Leicester*. Both of them carried on a large business.

The Plaintiffs were in the habit of packing their cigars in wooden boxes, holding fifty or 100 cigars; and as to a particular description, they were accustomed since the 23rd of April, 1869, with a view to make them easily distinguishable by dealers and consumers, to use a brand, or trade mark, which, as the bill alleged, consists of the words "*Flor Fina Prairie Superior Tabac.*" This brand they stamped on the small wooden boxes. The Plaintiffs' case was, that by means of this brand, and of certain labels affixed inside and outside the boxes, the quality of their cigars became well known and easily distinguished in the market. The Plaintiffs alleged that they had acquired the sole and exclusive right to the use of the word "*Prairie*" in connection with this particular quality of cigars. The Plaintiffs further alleged that on the 5th of February, 1872, they for the first time discovered that Mr. *George Becket*, of *Liverpool*, was in the habit of selling boxes of cigars similar in appearance, shape, and size, to those of the Plaintiffs, and stamped with the words "*Flor de la Prairie*," being an imitation of the Plaintiffs' boxes. They immediately applied to the vendor for an explanation, and he immediately gave them the name of the Defendants as the persons from whom he obtained such boxes. A correspondence then took place between the respective solicitors, and ultimately the Plaintiffs filed this bill for

(1) Law Rep. 1 Ch. 192.

a declaration of their right to the said trade mark, and for an injunction.

The bill alleged that "the Defendants purposely adopt the word '*Prairie*' and the words '*Flor de la Prairie*,' in order to lead buyers to the opinion that the cigars contained in the Defendants' boxes were the above-named quality of the Plaintiffs' cigars, and that persons who knew the word '*Prairie*' to indicate Plaintiffs' cigars, not only believed Defendants' to be Plaintiffs' cigars, but attributed to Plaintiffs the fraudulent use of the word '*Habana*' as applied to English cigars."

The Defendants, in their answer, alleged that the words "*Flor Fina*" on the upper part of their brand, and intended to be read in connection with the words "*de Superior Tabac*," and not in the connection "*Flor Fina Prairie*," as alleged by the Plaintiffs, were stamped without any other words upon one end of the said box. They gave a minute description of their trade mark, and denied that there was such a similarity between the two that one could be mistaken for the other.

The evidence on the part of the Plaintiffs was to the effect that purchasers would be probably led into mistaking the Defendants' boxes for those of the Plaintiffs, but there was no evidence that any person had been misled.

The Defendants adduced evidence to prove that no one could probably be misled.

The material part of the evidence is referred to in the judgment.

Mr. *Morgan*, Q.C., and Mr. *Edward Cutler*, for the Plaintiffs:—

The Plaintiffs' case is that the Defendants, by stamping on their boxes the word "*Prairie*" used by the Plaintiffs, and forming their trade mark, induced purchasers to believe when they purchased Defendants' boxes that they were purchasing Plaintiffs'. It is true that the Plaintiffs have not been able to obtain evidence that there has been actual deception, because such deception is often very difficult of proof; but the Plaintiffs are entitled to every part of their trade mark, and where the Defendants have taken part of it, the Plaintiffs are entitled to protection, even although if the two articles were placed together the one could not be mistaken for

V.-C. H. 1874

COPE v. EVANS.

the other: *Seixo* v. *Provezende* (1). It is no objection to the Plaintiffs' right to the exclusive right to the word "*Prairie*" as a trade mark, that the word "*Prairie*" may be used among the trade, nor that it is used by the Plaintiffs in connection with their own name: *Ford* v. *Forster* (2). The Defendants are bound to disprove any possible mistake. It is not necessary that proof should be given of actual deception, because if the Court is of opinion that from the appearance of the marks that deception is probable, it will grant relief: *Edelsten* v. *Edelsten* (3). The question is, what is the probable consequence of the infringement? *Kinahan* v. *Bolton* (4); *Hirst* v. *Denham* (5). The same principle was laid down in *Wotherspoon* v. *Currie* (6), where the likelihood of persons being deceived was held sufficient to entitle the Plaintiff in that case to an injunction, though the word "*Glenfield*" was, and had been for several years, the place of residence of the Defendant. In *Leather Cloth Company* v. *American Leather Cloth Company* (7), the same doctrine was laid down by Lord *Kingsdown*. In the Plaintiffs' evidence it is shewn that there is a probability of the public being deceived by the use the Defendants make of the Plaintiffs' brand. Moreover, the brands themselves shew that this is probable. On these grounds the Plaintiffs are entitled to an injunction.

Mr. *Lindley*, Q.C., and Mr. *H. A. Giffard*, for the Defendants:—

It is admitted that there is no evidence in this case of any person having in fact mistaken the Defendants' cigars for those of the Plaintiffs; and if so, unless the trade mark is a clear imitation, the Plaintiffs are out of Court. The principle of all the cases is, that one man has no right to pass off his goods for those of another: *Croft* v. *Day* (8); *Sykes* v. *Sykes* (9); *Leather Cloth Company* v. *American Leather Cloth Company*; *Wotherspoon* v. *Currie*; *Edelsten* v. *Edelsten* (10); *M'Andrew* v. *Bassett* (11); *Braham* v.

(1) Law Rep. 1 Ch. 192.
(2) Ibid. 7 Ch. 611.
(3) 1 D. J. & S. 185, 200.
(4) 15 Ir. Ch. Rep. 75.
(5) Law Rep. 14 Eq. 542.
(6) Law Rep. 5 H. L. 508.
(7) 11 H. L. C. 523.
(8) 7 Beav. 84.
(9) 3 B. & C. 541.
(10) 1 D. J. & S. 185.
(11) 33 L. J. (Ch.) 561.

Bustard (1); *Seixo* v. *Provezende* (2); *Ford* v. *Forster* (3); *Radde* v. *Norman* (4). It has been long settled that there is no property in a trade mark except in connection with this principle: *Millington* v. *Fox* (5); *Canham* v. *Jones* (6); *Collins Company* v. *Brown* (7); *Welch* v. *Knott* (8); *Burgess* v. *Burgess* (9). There must be the passing off of the Defendants' goods as a matter of fact, though where the fact is established the intention becomes immaterial: *Millington* v. *Fox*; *Clement* v. *Maddick* (10). But suppose the evidence fails to shew this, still, if the Defendants have fraudulently imitated the Plaintiffs' goods with a view to pass off their own, the Court will interfere; but no such case is made out by this bill: *M'Andrew* v. *Bassett* (11); *Edelsten* v. *Edelsten* (12); *Wotherspoon* v. *Currie* (13). In like manner, if there is no evidence one way or the other, but the Court is satisfied from the evidence that the one class of goods would probably be passed off for the other, it will relieve: *Hirst* v. *Denham* (14). It is quite clear there is no such resemblance here. The only cases that seem to favour the Plaintiffs' contention are the cases of *Seixo* v. *Provezende* and *Ford* v. *Forster;* but the most those cases shew is, that it is incumbent on the Defendants to disprove a probable passing off of the goods. In the present case, the passing off has not been proved as a fact, and the Defendants by their evidence, and by reference to the alleged imitation, have disproved the probability of it; secondly, no fraudulent intention or design has been shewn, but the reverse; and, thirdly, it has been shewn that there is no such similarity between the articles as is necessary to entitle the Plaintiffs to relief: *Woollam* v. *Ratcliff* (15). The Plaintiffs' case really depends on their having a property in the word "*Prairie*," which they certainly have not. The bill, it is submitted, must be dismissed with costs.

(1) 1 H. & M. 447.
(2) Law Rep. 1 Ch. 192–195.
(3) Ibid. 7 Ch. 611.
(4) Ibid. 14 Eq. 348.
(5) 3 My. & Cr. 338.
(6) 2 V. & B. 218.
(7) 3 K. & J. 423.
(8) 4 K. & J. 747.
(9) 3 D. M. & G. 896.
(10) 1 Giff. 98.
(11) 4 D. J. & S. 380–385.
(12) 1 Ibid. 185–220.
(13) Law Rep. 5 H. L. 508.
(14) Ibid. 14 Eq. 542.
(15) 1 H. & M. 259.

V.-C. H. 1874 COPE v. EVANS.

SIR CHARLES HALL, V.C. :—

The Plaintiffs are cigar manufacturers at *Liverpool*. The Defendants are cigar manufacturers at *Leicester*. Both carry on a large business.

The Plaintiffs pack their cigars in small wooden boxes containing fifty or 100 cigars, and as regards a special kind and quality of cigars, and to make that quality easily distinguishable to dealers and consumers, they have since the 23rd of April, 1869, used and still use a brand or trade mark which they in their bill state to consist of the words "*Flor Fina Prairie Superior Tabac*," which they have caused to be stamped by pressure on the small wooden boxes. The Plaintiffs say that thereby, and by means of certain labels inside and outside of the boxes, the quality of their cigars is well known and easily distinguished in the market; and they say that they have by the means aforesaid acquired the sole and exclusive right to the use of the word "*Prairie*" in connection with the particular quality aforesaid.

The Defendants have stamped boxes of cigars sold by them with a brand containing the words "*Flor de la Prairie*," which brand is stamped upon and pasted inside and outside the boxes. The Plaintiffs' case, according to their bill is this: they say in par. 6 of their bill, that by the use of the said words "*Prairie*" and "*Flor de la Prairie*" (*i.e.*, upon the boxes which are immediately before-mentioned), it is made to appear, not only to retail purchasers but also to the trade, that the cigars contained in the said boxes are those of the Plaintiffs' firm. In par. 10 of their bill the Plaintiffs allege that large quantities of cigars are sold by the Defendants in their boxes, and that they are inferior to the Plaintiffs' cigars, and are sold at a lower price than the Plaintiffs can sell theirs. They further say, in par. 11 of the bill, that the Defendants purposely adopt the word "*Prairie*," which latter word is a colourable imitation of the Plaintiffs' brand, "*Flor Fina Prairie*," in order to lead buyers to the opinion that the cigars contained in the Defendants' boxes are the above-named quality of the Plaintiffs' cigars, which is not the fact; and in par. 12 of their bill, that persons who inspect the Defendants' boxes of cigars, and who know the word "*Prairie*" to indicate cigars of the Plain-

tiffs, are not only led to believe that the cigars are the Plaintiffs', but attribute to the Plaintiffs the fraudulent use of the word "*Habana*," applied to English cigars. And in par. 13 of the bill it is stated that if the Defendants continue to sell boxes of cigars not of the Plaintiffs' manufacture, but bearing the brand and labels aforesaid, the Plaintiffs will sustain pecuniary loss and injury, and the reputation of the Plaintiffs' cigars will be seriously prejudiced. The Plaintiffs pray by their bill an injunction to restrain the Defendants from selling cigars, not being those of the Plaintiffs, packed in boxes bearing or having stamped thereon the word "*Prairie*," or any brand or label so contrived as by colourable mistake or otherwise to represent the cigars sold thereunder to be cigars supplied by the Plaintiffs, and for an account of profits made by selling cigars, not those of the Plaintiffs, packed in boxes bearing or having stamped thereon the word "*Prairie*," or any brand contrived as above-mentioned.

It seems clear that the Plaintiffs' complaint and case for relief, stated in the bill, are that by the Defendants stamping on their boxes as they do, it is made to appear to purchasers that the Defendants' cigars contained in these boxes are the Plaintiffs' cigars. The Plaintiffs thus ground their case on this, viz., that inspection of the boxes of the Defendants by intending purchasers misleads them, and that by reason thereof intending purchasers purchase the cigars of the Defendants as those of the Plaintiffs.

It may here be convenient for me to state what are the facts as regards the user, and knowledge by the Plaintiffs and Defendants of user, of the marks or brands above-mentioned. The Plaintiffs have used their alleged trade marks since the 23rd of April, 1869. The Defendants commenced using their alleged trade mark in March, 1870, and first became aware of the Plaintiffs using their (Plaintiffs') alleged trade mark about the middle of the year 1871. The Plaintiffs' became aware of the Defendants using their trade mark about the 5th of February, 1872.

The Plaintiffs from the time of their commencing the user of their trade mark became entitled to the protection of this Court against any other persons using the same, so as that purchasers might be induced to purchase the goods of other persons as the Plaintiffs' goods. And it is not an answer to an application for an

V.-C. H. 1874 COPE v. EVANS.

injunction to restrain the user thereof by another person, for such other person to say and prove that he adopted the trade mark without knowing that it already belonged to the Plaintiff. The Defendants should therefore be restrained if they have used the Plaintiffs' trade mark. In considering whether they have so done, it is not, I consider, sufficient for the Plaintiffs to say, "Our trade mark, viz., the word '*Prairie*,' appears somewhere on your (Defendants') boxes." In cases where it appears that Defendants have adopted a Plaintiff's trade mark, and it is proved that Defendants' object in doing so was to pass off their own goods as those of the Plaintiff, the Court will, without further inquiry, restrain the Defendants, and it will also do so where there has been such adoption, although proof of the Defendants' object be wanting, if it appear that any one has in fact been thereby induced to buy the Defendants' goods as being the goods of the Plaintiff. In the absence of proof of such object and of such deception, if the two trade marks are not to the eye of the Court either altogether identical, or so similar that the Court considers the difference unsubstantial, the Plaintiff must make out to the satisfaction of the Court that its intervention is required to protect the Plaintiff from the Defendants' goods being taken for his (Plaintiff's). For the Plaintiff to say that his name or mark is to be found on the Defendants' goods is not sufficient. Thus, in the case of *Bradbury* v. *Evans*, in which the proprietors of *Punch* sought unsuccessfully to restrain the sale of a weekly publication which had adopted the name of *Punch and Judy*, the Court, looking at the two publications, and considering that the later publication would not be taken by purchasers for the earlier one, refused to interfere. The two were so dissimilar in appearance, that, whether the two publications were seen side by side or were seen separately, the one would not be taken for the other. The Plaintiffs' counsel has admitted that he could not make out his case if it depended upon mere inspection by the Court, but he nevertheless said that the words used by the Plaintiffs and the Defendants were in reality, or at all events should be deemed by the Court to be identical, to make out which he said that there was sufficient evidence before the Court to prove that the words "*Flor Fina*" in the Plaintiffs' brand and the words "*Flor de la*" in the Defendants' brand, were mere

prefixes, and would be disregarded. He further said, that, having regard to the evidence, the Court should at all events, if it did not consider there was actual identity, consider the case as one of colourable imitation or of unsubstantial difference between the two trade marks. It appears to me that in cases in which the Court is upon inspection alone not satisfied of the identity of the two trade marks, or of such a similarity as that the one must be deemed a colourable imitation of the other, the Court should not grant an injunction as of course upon such evidence as the Plaintiffs' counsel relied on. I think that the Court must consider the whole evidence, and, before it grants an injunction, be satisfied that its interposition is really required. However ready the Court is and should be to protect trade marks when protection is really required, it must not be forgotten that such protection by injunction, when granted, is or may be attended with loss to the Defendant in rendering useless or depreciating in value articles to which the trade mark has already been affixed, and in compelling him otherwise to vary the mode in which he has been carrying on business. I therefore proceed to see how the evidence stands. The Plaintiffs, not bringing forward any evidence of deception, have produced a witness, a Mr. *Hyam Jonas*, a tobacco merchant and importer of cigars, who, in an affidavit filed on the 26th of June, 1873, par. 5, says, "The words '*Flor de la Prairie*' on the Defendants' boxes of cigars are, in my judgment and belief, in substance, as a brand, the same as '*Flor Fina Prairie*' on the Plaintiffs' boxes of cigars; and I say that if two brands, as substantially the same or so nearly identical as those in question, could be legally used by different traders, considerable loss and damage would be sustained by the person who first commenced to use the brand, and whose cigars commanded an extensive sale, and the public generally would be misled and defrauded by having inferior goods sold under a brand or name which could or would not be practically distinguished from the brand which had required repute in the trade or estimation with the public." Five other witnesses depose to the same effect. I observe upon these affidavits that the witnesses do not say that they individually would be misled by the Defendants' boxes having thereon the word "*Prairie*" as it is thereon; their statements as to the public being misled are only statements of the

V.-C. H. 1874 COPE v. EVANS.

opinion of the witnesses. In answer to these affidavits, *Richard Sherwood*, a tobacconist and wholesale and retail dealer, in an affidavit filed on the 5th of July, 1872, par. 6, says, "I have seen the Plaintiffs' '*Prairie*' brand cigars, and I say from my experience that owing to the great dissimilarity between such brand and that of the Defendants, called '*Flor de la Prairie*,' or '*Prairie Flower*,' it would be utterly impossible for a tobacconist, or dealer in cigars, or the public generally, to be misled and deceived by having the one substituted for the other." Five other witnesses depose to the same effect. I observe upon these affidavits that the witnesses, I consider, say in effect that they would not be deceived. Their evidence as to the public, like the evidence for the Plaintiff as to the public being misled, consists only of statement of opinion. The Defendants in their answer, par. 22, say that they believe no one has been misled. I cannot, upon this evidence for the Plaintiffs and Defendants, say that I am satisfied that the use of the word "*Prairie*" on the Defendants' boxes, as it has been used thereon, will cause their goods to be sold for those of the Plaintiffs.

The Plaintiffs have, however, brought forward in argument a further contention. I do not stop to inquire whether this is open on the pleadings in this suit. They have said that, in giving orders for cigars, the orders are commonly given mentioning only the name of the brand, which in this case is "*Prairie*," and in this way the use of the word "*Prairie*" on the boxes will lead to the Defendants' goods being sold for the Plaintiffs'. In support of this, it is said by Mr. *Jonas* in his affidavit already referred to, pars. 3 and 4, as follows: "The words '*Flor*,' '*Flor Fina*,' and '*Flor de la*,' are very frequently prefixed to the name or brand as stamped on the boxes in which the cigars are sold, and the trade and the general public, when referring to any particular brand of cigars to which either of those forms of words is prefixed, almost invariably use the distinctive word or name of the brand, and omit the words '*Flor*,' '*Flor Fina*,' or '*Flor de la*.' Such words on boxes of cigars are common to the great mass of cigars sold, and are, by usage, treated as superfluous for describing the particular brand intended." Par. 4: "I am almost daily in the habit of giving orders for cigars to be supplied to my said firm, or of receiving

orders for cigars to be supplied by my said firm, and I say that in almost every case such orders are given for the cigars by the distinctive name or brand, and without the addition of '*Flor*,' '*Flor Fina*,' or '*Flor de la*,' whenever those prefixes are used on the boxes as part of a brand." Five other witnesses deposed in similar terms. On the part of the Defendants, *Richard Sherwood*, in his affidavit above referred to, pars. 2, 3, and 4, says: (Par. 2) "The words '*Flor*' and '*Flor Fina*' are used by all the English manufacturers to denote the different qualities of cigars, and are not a part of or prefixed to the name or brand of the cigar, except in very occasional cases." (Par. 3) "I know the '*Flor de la Prairie*' or '*Prairie Flower*' cigars manufactured and sold by the Defendants under that title, and I say that in my opinion the words '*Flor de la*' are an integral and inseparable part of the designation '*Flor de la Prairie*,' or '*Prairie Flower*,' and that such words have quite a different meaning to the words '*Flor*' and *Flor Fina*,' and are used in an entirely different manner." (Par. 4) "I have never known the words '*Flor de la*' to be used as a prefix to the name or brand of any other cigars than the '*Flor de la Prairie*' or '*Prairie Flower*' cigars of the Defendants." More than six other witnesses depose to the same effect. As to this the Defendants say in an affidavit filed by them on the 3rd of July, 1872, par. 7, "And we further say that our cigars are invariably ordered from us by our customers, and invoiced by us to them, under the distinctive title '*Flor de la Prairie*' or '*Prairie Flower*,' and never under the title of '*Prairie*' alone." Thus, if this affidavit is credible, although the Defendant had been carrying on business and using the brand, the user of which is sought to be restrained from March, 1870, until the 3rd of July, 1872, they never received an order for "*Prairie*" cigars so described without the prefix "*Flor de la*," and no instance has been produced of any such order having been given. As to the credibility of this statement, it is to be observed that the Plaintiffs have interrogated the Defendants, and had an answer telling them, par. 23 of the answer, all the orders actually given; and no doubt the Plaintiffs have had, or might have had, inspection of all the Defendants' books and papers. I think the Defendants' statement must be taken to be correct, there being no evidence given that any one

V.-C. H. 1874 COPE v. EVANS.

ever did give an order for the Defendants' cigars without the prefix. But the Plaintiffs' counsel have concluded that, if such an order has not been given, it "may" be given, and that the judgment given by Lord *Cranworth* in *Seixo* v. *Provezende* (1) compels me to give judgment in the Plaintiffs' favour. In that case the Plaintiff, the owner of a vineyard, sought to restrain the Defendant from marking his casks with a particular brand; it is stated in the report (2) a great quantity of evidence was entered into on both sides upon many points, particularly as to whether the Defendant's quinta had ever been called *De Seixo*. It was proved by the Plaintiff, and not denied, that the broker employed by the Defendant had offered this wine as "*Crown Seixo de Cima*" wine; and one broker deposed that he was surprised at being offered this wine by the broker of the Defendant, and thought it was the Plaintiff's. The Plaintiff's quinta would produce about 300 pipes a year, but those of the Defendant would not produce more than forty pipes. There was, therefore, actual deception. But the Plaintiffs in the present case principally rely upon the passages of Lord *Cranworth's* judgment, to which I will now refer (3): "If the question turned on the inquiry whether a person having a cask of the Plaintiff's and a cask of the Defendant's placed before his eyes could mistake the one for the other, there could be no doubt as to the result, for the marks on the one and on the other are altogether different. But that is not the question, or not the sole question, to be considered. The principle on which relief is given in these cases is that one man cannot offer his goods for sale representing them to be the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a

(1) Law Rep. 1 Ch. 192. (2) Law Rep. 1 Ch. 193.
(3) Law Rep. 1 Ch. 195, 196.

right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy."

"If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival" (this manifestly means of the other trader) "as the actual copy of his device. It is mainly on this ground that I have come to the conclusion that the decision of the Vice-Chancellor in the present case was correct."

"Ever since the year 1848, the Plaintiff, Baron *Seixo*, had caused his casks to be stamped with his coronet and the word '*Seixo*,' and the evidence shews that his wines had thus acquired in the market the name of '*Crown Seixo* Wine.' When, therefore, the Defendant, in the year 1862, adopted as his device a coronet, with the words '*Seixo de Cima*,' meaning *Upper Seixo*, below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from *Oporto* would suppose that, in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as '*Crown Seixo* Wine.' The present case is thus brought distinctly within the principle on which all these cases rest. The Plaintiff had adopted a device, or trade-mark, which had caused his wines to obtain celebrity under a name descriptive of that trade mark. The Defendant has adopted a trade mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the Plaintiff's wines were known, and so to

V.-C. H. 1874 COPE v. EVANS.

believe that in purchasing them they would be purchasing the wines of the Plaintiff. Against the use of such a trade mark the Plaintiff has a right to have the injunction of this Court."

Lord *Cranworth* here says that if the rival trader adopts a mark which will cause his goods to bear the same name in the market, this may be a violation. He then proceeds to examine the case before him, and says that, the mark being adopted, the consequence was almost inevitable that persons would suppose that in purchasing a cask of the Defendant's wine they were purchasing that of the Plaintiff; that the Defendant's mark could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the Plaintiff's wines were known. Have the Plaintiffs in the present case shewn that the Defendants' user of their mark will cause their goods to be taken for the Plaintiffs'? Will it be the inevitable consequence of the use by the Defendants of their mark that purchasers in purchasing the Defendants' cigars will believe that they are purchasing the Plaintiffs'? Is it true that the Defendants' mark cannot fail to attribute to their goods the same name as is used by the Plaintiffs? Upon the evidence in this case, I answer all these questions in the negative.

I have not examined all the numerous decisions which were referred to in the course of the argument. They are so well known, and so constantly referred to, that to do so is, I think, unnecessary; but I desire to mention shortly a few of them in reference to what is stated in them, as to when the Court should interfere in cases of this kind.

In *Kinahan* v. *Bolton* (1) Lord Chancellor *Brady* says (2), that injury might be done by inducing the belief that the spurious article was genuine. In *Seixo* v. *Provezende* (3) Lord *Cranworth* said, that the Defendant was not justified in adopting a device or brand the probable effect of which would be to lead the public to purchase his wine supposing it to be the Plaintiff's. In *Edelsten* v. *Edelsten* (4) Lord *Westbury* says (5), "It is not necessary for relief in equity that proof should be given of persons having

(1) 15 Ir. Ch. Rep. 75.
(2) Ibid. p. 77.
(3) Law Rep. 1 Ch. 198.
(4) 1 D. J. & S. 185.
(5) 1 D. J. & S. 200.

been actually deceived, and having bought goods with the Defendants' mark, under the belief that they were the manufacture of the Plaintiffs, provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other." In *Hirst* v. *Denham* (1) Vice-Chancellor *Bacon* puts the title to relief on the ground that purchasers may be misled. In *Wotherspoon* v. *Currie* (2) Lord *Chelmsford* says, "It is not necessary to shew that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to shew an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs." In *Leather Cloth Company* v. *American Leather Cloth Company* (3) Lord *Kingsdown* says, "The general rule seems to be, that the mis-statement of any material fact calculated to deceive the public will be sufficient for the purpose."

From these judgments I take it that the law of the Court is, that it will not grant the injunction unless it is satisfied that there will be deception, or that there is a probability or likelihood of deception, or, in Lord *Kingsdown's* words, that what the Defendant does is calculated to deceive. In this case I am not so satisfied. The burden of proof is on the Plaintiffs, there being no proof of actual deception, and no proof that the Defendants' object was deception. The Vice-Chancellor *Wood*, in *Woollams* v. *Ratcliff*, says (4), "I do not believe that any one, at least in *England*, would have been in fact deceived in the absence of the special trade mark. . . . I have no evidence that any one has been in fact deceived, and I do not think myself justified in assuming that such has been the case." Nor do I, in this case, feel myself so justified; I must dismiss the Plaintiffs' bill, and of course with costs.

Solicitors for the Plaintiffs: Messrs. *Lumley & Lumley.*

Solicitors for the Defendants: Messrs. *Paterson, Snow, & Burney.*

(1) Law Rep. 14 Eq. 542.
(2) Ibid. 5 H. L. 508
(3) 11 H. L. C. 523, 542.
(4) 1 H. & M. 259, 263.

11 Jur. N.S. 573.-7

V.-C. H.
1874
April 30.

PERRY *v.* MERRITT.

[1872 P. 58.]

Will—Repugnancy—Gift for Absolute Use of Legatee—Subsequent Bequest of Money remaining after Death of Legatee.

10 Ch D. 734
13 Ch D. 146
14 Ch D. 263
24 Ch D. 617

Testator gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money (if any) that should be remaining after payment of his wife's just debts, he gave to legatees named as tenants in common, equally. The widow died shortly after the testator, intestate:—

Held, that she took an absolute interest in the residuary personal estate, and that it belonged to her next of kin.

FURTHER CONSIDERATION.

Thomas Merritt, who died on the 28th of November, 1871, by his will, dated the 26th of April, 1870, gave to two trustees, the Plaintiffs (whom he also appointed executors), their heirs, &c., all his real and personal estate, upon trust, after paying his debts, funeral and testamentary expenses, and certain legacies, to pay the residue of his personal estate to his wife *Elizabeth Merritt*, "for her own absolute use and benefit," and he directed his trustees to pay the rents and annual income of all his real and leasehold estates to his wife during her life. The testator then gave certain legacies of small amounts to several legatees, and after the death of his wife gave to his grandson *Charles Jenkins* the rents of two leasehold houses, the said rents to be for the sole support and maintenance of his daughter, *Elizabeth Merritt*, the first-named Defendant (a person of unsound mind, but not so found by inquisition), during her life, and after her death the said houses were to be sold by the trustees, and the proceeds divided between the testator's daughter *Ann Griffiths* and three other persons named. The testator gave some small annuities to other beneficiaries, and then gave unto his grandson above-named, after the death of his wife, all his freehold house and lands situate at

Bitton, in fee, "and all the money (if any) that shall be remaining after payment of the just debts and funeral expenses of my dear wife *Elizabeth Merritt*, shall be equally divided between my said daughter *Ann Griffiths* and her three children," and three other persons named, "share and share alike as tenants in common." The widow of the testator died on the 17th of December, 1871, intestate, and the first-named Defendant was her sole next of kin. *Ann Griffiths*, the only other next of kin of the testator, was a daughter by a former wife. The testator left property of considerable value, and the trustees filed this bill for its administration by the Court. The material question now was, whether the testator's widow was entitled to the residuary personal estate absolutely or not?

Mr. *C. T. Simpson*, for the Plaintiffs, stated the facts of the case.

Mr. *B. B. Rogers*, for the first-named Defendant, contended that the widow took an absolute interest, and that the gift at the end of the will was nugatory. In *Watkins* v. *Williams* (1) it was decided that where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person, but it belongs to the first donee absolutely.

[He also referred to *Randfield* v. *Randfield* (2).]

Mr. *T. L. Wilkinson*, for the Defendants *Charles Jenkins* and others, submitted that they were entitled to the residuary personalty.

SIR CHARLES HALL, V.C.:—

I think that the principle of the case of *Watkins* v. *Williams* is applicable to a case of this description. The whole of the residue of the personal estate was given to the wife for her own absolute use and benefit. She was, I think, at liberty to apply, dispose of, and to spend the capital for her own use and benefit as she might think proper. The wife having that power to spend the capital, what does the other gift at the end of the will amount to? That

(1) 3 Mac. & G. 622. (2) 2 De G. & J. 57.

V.-C. H. 1874 PERRY v. MERRITT.

gift is in substance one of the money remaining after the payment of the just debts of his wife, *i.e.*, the money remaining after what the wife had thought proper to spend; and the payment of her just debts. A gift of this kind is of so indefinite a character, and is so repugnant to the power of disposition given to the wife, that I cannot give effect to it. In *Henderson* v. *Cross* (1) there was a bequest of residue to the testatrix's father "to spend both principal and interest, or any part of it, during his lifetime;" should he "not spend the property," then in trust for the testatrix's sisters; and it was held that the gift to the father was absolute, and that the gift over was inconsistent with it, and inoperative. The Master of the Rolls decided the case upon that ground, and in that case *Ross* v. *Ross* (2), in which a limitation over was held to be void, was referred to. I am of opinion that the widow was absolutely entitled. There must be a declaration to that effect, and the personal estate in Court must be carried over to the separate account of her legal personal representative.

Solicitors: Messrs. *Cowdell, Grundy, & Browne*, agents for Mr. *H. H. Field, Swansea;* Mr. *L. W. Gregory*, agent for Mr. *Jonathan Perrin, Bristol.*

V.-C. H. 1874 *March* 18, 19, 20, 21.

HILL *v.* SOUTH STAFFORDSHIRE RAILWAY COMPANY.

[1857 H. 165.]

Railway Company and Contractor—Disputed Accounts—Demand of Payment—Interest—3 & 4 Wm. 4, c. 42, s. 28—Costs.

15 Ch D 1345

The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result shewed that he was entitled to a balance less than one-half of the sum which he had claimed to be due from the company:—

Held, that the contractor was not entitled to interest either under the con-

(1) 29 Beav. 216. 7 Jur. N.S. 177 (2) 1 Jac. & W. 154.

tract, there being no express stipulation on the part of the company to pay any, or under the statute 3 & 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time.

Mildmay v. *Methuen* (1) and *McIntosh* v. *Great Western Railway Company* (2) observed upon.

THE Plaintiff *Thomas Hill* and two others, on the 6th of August, 1847, entered into a contract with the *South Staffordshire Railway Company* to construct their line of railway in accordance with the specification annexed thereto, and to complete the works on or before the 1st of September, 1848. There were supplemental contracts subsequently to construct additional works. The time for completion of the railway was, in November, 1848, extended to the 1st of July, 1849, and a bonus of £4000 was then promised for extra dispatch. In April, 1849, the time was again extended to November, 1849, and another bonus of £2000 was promised for extra dispatch. The railway was completed, handed over to the company, and opened on the 1st of May, 1850. One clause of the original contract provided, that it should not be lawful for the contractors to make any alterations, additions, or omissions whatsoever without the express direction and consent in writing of the principal engineer of the company for the time being, countersigned by the chairman of the directors for the time being, for that purpose first had and obtained on each occasion: and in respect of any alterations, additions, or omissions made without such express direction or consent as aforesaid, countersigned as aforesaid (whether adopted or objected to at the time, or afterwards, or not), the contractors should not be entitled to, or to demand or recover from the company, or their successors, any allowance or payments whatsoever. By another clause of the contract it was agreed that the contractors should be paid for the whole of the works therein contracted to be done the sum of £92,511 12*s.* 6½*d.*, subject to stipulations for the diminution thereof in case of certain alterations of, or omissions from, the works, and, also, such further or other sum as the principal engineer might certify in writing under his hand to be due from the company to the contractors for alterations or extra work; and the same was to be paid as the works proceeded by instalments every month of such amount (less

(1) 3 Drew. 91. (2) 4 Giff. 683. 11 Jur. N.S. 681

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

10 per cent.) as the principal engineer of the company might at the end of any month (upon being furnished by the contractors with an account of such works) certify. In the specification it was stated that the contractor was to maintain all the permanent works constructed under the contract, and leave the same in complete repair twelve calendar months after the completion of the whole of the works as thereby required by the contract, and the contract would not be completed until the termination of such liability to uphold; but such liability was to be limited as to any portions to twelve months after any such portions should have been opened for public traffic, if opened before the whole of the works had been entirely completed. A part of the line was completed on the 3rd of August, 1849, another part in March, 1850, and the whole of it was completed and opened for traffic on the 1st of May, 1850; therefore, the year of maintenance expired on the 1st of May, 1851. The 10 per cent. was to be retained until the completion of the works.

The aggregate amount actually paid was £136,094, but the total sum claimed by the contractors in their final bill was in excess of that amount. They also claimed the before mentioned two sums of £4000 and £2000. There was also a claim for extra works mentioned in the accounts of daywork. The last certificate of the engineer was dated in March, 1852. The whole railway was in February, 1851, leased to Mr. *Maclean*, the principal engineer of the company. The contractors sent to the company their final account, and asked for payment of what they alleged remained due, viz., £13,000 odd. That account was investigated by the engineer. A controversy arose as to the allowance by the engineer of the bonuses, and of certain other sums. The contractors declined to refer the whole matters in dispute to Mr. *Maclean's* arbitration, on the ground that he was lessee of the railway. On the 25th of April, 1856, the contractors' solicitor wrote to the company, enclosing a summary of their account against the company, by which, he said, the company would see that the contractors claimed a balance of £13,000 odd, "and interest thereon from the respective times when the money ought to have been certified and paid to the time of payment." As it was found that the contractors and the company could not settle their differences, this suit

was instituted by *Thomas Hill*, the surviving contractor, on the 10th of August, 1857, against the Defendants, the *South Staffordshire Railway Company*, and *R. C. Chawner*, the chairman, *J. R. Maclean*, the engineer, and, by amendment, *T. J. Buckton*, the secretary, and it sought a declaration that the Plaintiff was entitled to two sums or bonuses of £4000 and £2000, which, it was alleged, were promised him in consideration of extra dispatch, with a view to getting the works done by a certain time. The Plaintiff also claimed a sum of £13,000 odd, in addition to the sums which had been paid by the company; and it also sought to have an account taken of what was due to the Plaintiff in respect of the contracts entered into by him, and prayed that the Defendants might be charged with interest on the sums unpaid, which the Plaintiff was from time to time entitled to receive under the certificates; and also on the balance which might be found due from the Defendants in taking the accounts; and that in taking the accounts certain allowances might be directed to be made for losses sustained by the Plaintiff by reason of non-delivery of possession of land to him as contractor within the time limited by the contract.

The cause came on to be heard before Vice-Chancellor *Stuart* in 1864 (the bill having previously been amended and re-amended), and by the decree made by him, dated the 8th of March, 1864, it was declared that the Plaintiff was entitled to be allowed the sums of £4000 and £2000 claimed by him in respect of bonuses agreed to be paid by the Defendants to him for extra dispatch, increased expenses, and extraordinary means used and employed in expediting and completing the works of certain parts of the railway; that the Plaintiff was also entitled to be allowed the sum of £1800 in respect of losses and damages sustained by the delay in getting possession of certain land; and that the Plaintiff was also entitled to be allowed the sum of £1249 14*s.* claimed by him as a remuneration for expenses incurred by him in reconstructing works which had given way in consequence of a subsidence of the ground, occasioned by mining operations; and it was ordered that the Defendants should, on or before the 30th of April, 1864, pay to the Plaintiff the said sums, together £9040 14*s.*, with interest at the rate of £5 per cent. from the 26th of April, 1856, being the date

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

of the letter of the Plaintiff's solicitor, claiming interest to the day of payment. It was at the same time ordered that an account should be taken of what, if anything, remained due to the Plaintiff in respect of the balance of daywork claimed by him in his final account; that the Defendants should, within one calendar month after the chief clerk's certificate, pay to the Plaintiff what should be certified to be due to him on taking the said account, together with interest thereon at £5 per cent. from the 26th of April, 1856, to the day of payment; that the costs of the inquiry should be reserved to be dealt with as the Judge in Chambers should direct, and that the Defendants, the railway company, should pay to the Plaintiff his costs of the cause, up to and including the decree. The bill as against the other three Defendants was dismissed, without costs.

The Defendants appealed against that decree.

By an order of the Lords Justices, dated the 21st of January, 1865, the decree of the 8th of March, 1864, was discharged without prejudice to any questions in the cause; and it was declared that the Plaintiff was entitled to be allowed in the account thereinafter directed the said sums of £4000 and £2000. But it was also declared that the Plaintiff was not entitled to be allowed the sum of £1800, or any part thereof, and was not entitled to any allowances in respect of any loss or damage sustained by delays in getting possession of lands; and it was ordered that an account should be taken of what (if anything) remained due to the Plaintiff in respect of the several works and matters included in the final account and in the accounts of daywork delivered by the Plaintiff to the Defendants—the company; and in taking such account, any items in the accounts delivered which might be found to have been settled were not to be disturbed; that for the purposes of such account all such inquiries should be made as might be necessary for the purpose of ascertaining what (if anything) the Plaintiff and his co-contractors, or the survivor of them, had become entitled to, or the Plaintiff was then entitled to, in respect of accidents or damages arising from mining operations, and what (if anything) the Plaintiff should be found to be entitled to in respect thereof was to be allowed him in taking the said account; that the Plaintiff's bill should stand dismissed as against the

Defendant *T. J. Buckton*, with costs; that the amount of such costs should be paid by the Plaintiff to the said Defendant, but such payment was to be without prejudice to any question as to the Plaintiff being ultimately entitled to recover such costs against the company; that the bill should stand dismissed, without costs, as against the other two Defendants above named; and all questions of interest were reserved, and also all other costs and further consideration, to the Judge to whose Court the cause was attached. The Plaintiff, *Thomas Hill*, died in February, 1867, during the prosecution of the accounts, having by his will appointed his wife and two other persons executors thereof; and they, on their petition in November, 1867, were allowed to revive the suit.

The Defendants appealed to the House of Lords against the decree of the Lords Justices; and subsequently the Plaintiffs also appealed in respect of the disallowance of the sum of £1800. The House of Lords, on the 29th of July, 1872, ordered that the decree of the Lords Justices should be varied by directing an account to be taken of what (if anything) was due to the Plaintiff on the footing of the several contracts in the pleadings mentioned in lieu of the account which was directed by the said decree; and that, subject to such variation, the said decree in other respects should be affirmed; that the Appellants should pay to the Respondents the costs incurred in respect of the appeal; that the cross appeal should be dismissed; that the Appellants in the cross appeal should pay to the Respondents therein their costs in respect of such cross appeal; and that the cause should be remitted back to the Court of Chancery.

In pursuance of the directions given by Vice-Chancellor *Wickens*, the Chief Clerk, in July, 1873, certified, first, that there was due to the Plaintiffs on the footing of the several contracts in the pleadings mentioned, including the two sums of £4000 and £2000, and including also any sums allowed pursuant to the order of the 21st of January, 1865, in respect of accidents or damages arising from mining operations, the sum of £5626 16*s.* 9*d.* The particulars of this sum were set forth in the first schedule to the certificate. The Chief Clerk stated that, for the purpose of taking the account the final bill and accounts for daywork mentioned in the order of January, 1865, were produced; and that he had taken

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

the account by reference to admitted copies thereof; and that such items as had been allowed and remained due to the Plaintiffs in respect of the several contracts referred to were mentioned in such first schedule; and such of the items claimed by the Plaintiffs to be due in respect of the said contracts as did not appear in the first schedule had been disallowed. The evidence produced before the Chief Clerk in taking the accounts was mentioned in the second schedule to the certificate. Of the above-mentioned sum of £5626 16*s.* 9*d.*, the sum of £1272 10*s.* 6½*d.* was for "allowances on account of extra works mentioned in the accounts of daywork hereinbefore referred to."

The Defendants, in August, 1873, took out a summons to vary the certificate by disallowing certain items. The summons was refused on the ground that the points raised had been concluded by the previous judgments.

On the further consideration, the material questions were: first, whether the Plaintiffs were entitled to any interest; and, secondly, who should pay the costs of the litigation?

Mr. *Dickinson*, Q.C., and Mr. *T. A. Roberts*, for the Plaintiffs:—

First as to the question of interest. This litigation arose in consequence of the company refusing to pay to the contractors the balance which they claimed in the final account. The railway was opened on the 1st of May, 1850. By the contract the contractors were to be paid monthly, less 10 per cent., which the company were to retain, as the contractors were to maintain the works for twelve months after the completion of them. At the end of that time there should have been a final payment. The company did not perform that duty. Disputes had arisen in reference to the accounts. Those accounts were investigated during the years 1851–2–3, but it was not till August, 1857, that this suit was instituted for the purpose of compelling payment of what was claimed. When the cause was heard by Vice-Chancellor *Stuart*, in 1864, he considered that as to the sums of £4000 and £2000, they were by the agreement to be paid immediately, without regard to any account, and he ordered the company to pay interest upon them. It appeared, however, that there had been payments of portions of those two sums from time to time, and therefore the

Lords Justices considered that those sums were not to be paid at a time certain, but that they should enter into the general account. Their Lordships would not order interest to be paid at once, because those sums had practically been brought into such account. They were, it was said, not sums certain to be paid at a certain time, but after the account had been taken. Their Lordships said, however, it might be that the company would be bound to pay interest on the sum due from the company when it should be found due.

Now it is submitted that the "certain sum" is a sum to be ascertained on taking the account. By the term "certain," a particular sum of £9000 or £10,000 is not meant; but the certain sum is the sum due on the contract, and according to the interpretation of the contract, the sum certain that was to be paid to the Plaintiffs was the amount which is now found due, after deducting those sums which had been paid to them—the balance of that sum is the sum which has been made certain by taking the account, and which was payable to the Plaintiffs immediately upon the completion of their contract and the handing over of the works to the Defendants on the 1st of May, 1850, or at any rate so far as the 10 per cent. is concerned, from the 1st of May, 1851. If there had been nothing else, that would be sufficient to entitle the Plaintiffs to interest as from those times; but it does not stop there: for in the case of a mortgage or other deed in which there is a covenant for payment of a sum certain, which of course means a certain amount, which can be made certain, though there is no provision for payment of interest, the covenant for the payment of a certain sum will carry interest: *Ashwell* v. *Staunton* (1). Now on the construction of this contract, as payment was to be made from month to month, although not quite complete, because 10 per cent. was to be kept back, the time certain was the time of the completion of the works. If the sum certain was dependent on the execution of the works, the amount has been derived from and made certain by the taking of the account, and therefore upon the account being taken, and the sum ascertained with certainty, as it has been, that is the sum which the Defendants contracted to pay, and the sum which was contracted to be paid at the certain

(1) 30 Beav. 52.

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

time mentioned; but if that be not so, then it is submitted that the written demand of the 25th of April, 1856, for payment of interest, is sufficient.

[The VICE-CHANCELLOR:—Is there not some difficulty in all that when the Plaintiffs were claiming that to which they were not entitled?]

They do not claim interest on what they are not entitled to, but on what they are entitled to; and what that is depends on taking the accounts properly. There is no reason why that which they are entitled to should not carry interest, because there is something else in the accounts which they are not entitled to. The amount to which they are entitled has been ascertained on taking the accounts, and that having been done, the Plaintiffs are entitled to interest as from the time when the sum should have been paid. If the company had tendered or offered to pay the sum now found due to the Plaintiffs, and they had not taken it, that would have stopped the payment of interest if it had afterwards turned out that the Plaintiffs were in the wrong. But the Defendants made no offer, and this suit became necessary, and as the result of it shews that the Plaintiffs have been kept out of their money since 1850, or at any rate since 1851, as to the 10 per cent., and the company having failed in their contention, it is submitted that the Plaintiffs are entitled to interest from that time, or at all events from the date of the receipt by the officer of the company of the letter of the 25th of April, 1856: *Alison's Case* (1).

It was also contended that, as the Plaintiffs had virtually succeeded in their litigation, they were entitled to all their costs of the suit, including any that the Plaintiffs might have to pay Mr. *Buckton;* and they referred to *Jeffryes* v. *Agra and Mastermman's Bank* (2).

Mr. *Lindley,* Q.C., Mr. *Speed,* and Mr. *Millar,* for the Defendants:—

As to interest: On what principle are the Plaintiffs to have it? Under the contract, or in some other way? But the contract says nothing at all about it. There is no covenant, nor is there any

(1) Law Rep. 15 Eq. 394; Ibid. 9 Ch. 1. (2) Law Rep. 2 Eq. 674.

recital in the contract to pay any. There is a stipulation that the company were not to pay interest on the 10 per cent. which they were at liberty to reserve, but whether any was reserved is not known. It may be inferred from the certificates of the engineer that the company did not reserve it. There is nothing in the contract in the shape of a covenant which would entitle the contractor to maintain an action against the company for interest. In *Ashwell* v. *Staunton* (1), there was a covenant to pay a certain sum of money on a certain day, and there the Master of the Rolls gave interest because of the recital in the deed. The judgment, in fact, proceeded upon it. But in the case of *Thompson* v. *Drew* (2), the Master of the Rolls, the covenant there being in a mortgage deed to pay on a certain day, said, "I think the deed does not carry interest." Apart from these authorities, it is perfectly plain that where there is no contract or express covenant to pay interest, it can be got only on one of two principles: by mercantile usage, apart from any statute; and under the statute 3 & 4 Will. 4, c. 42. Apart from that statute there is no obligation to pay interest, because a sum of money may be made payable by deed or otherwise on a particular day. To enable any person to obtain interest under the statute, there must be a debt or sum certain; it must be payable at a certain time by virtue of a written agreement, or there must be a written demand for payment of the interest, and in that case it will run from the time of the demand. The statute applies only to debts or sums certain—it has nothing whatever to do with demands for unliquidated damages. Is the sum now found to be due from the Defendants a debt or sum certain? That will depend upon the meaning of the expression "certain." There was no certainty what would become payable to the contractor, even in respect of the £92,000, for that was subject to variation. And unquestionably the other sums which became payable under the contracts were not sums certain. What is meant by a "sum certain?" Everything is certain when it is ascertained, but to put on the expression "sum certain" in the statute the wide interpretation contended for on the part of the Plaintiffs would be improper. It is said that anything is certain which may be rendered so, by the contract or anything else—that is clearly too wide a construc-

(1) 30 Beav. 52. (2) 20 Beav. 49.

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

tion. The question, what is a "sum certain," arose under the *Stamp Act*, 55 Geo. 3, c. 184. In *Annandale* v. *Pattison* (1), there was a bond by which a principal and a surety bound themselves to pay to the creditors of a debtor 14*s.* in the pound on the amount of their debts, and by the same bond the principal bound himself to indemnify the surety against all loss. The bond of indemnity was for that which some one might have to pay, and that which might have to be paid was ascertained by a simple calculation. If it had been a bond for a sum certain, it would have required a larger stamp than that affixed; but it was held that the bond was not for any certain sum of money, so as to require an *ad valorem* stamp. There was, however, nothing uncertain in that particular case. All that had to be done was to find out how 14*s.* in the pound were to be covered by the bond—a mere matter of calculation—and therefore there was a bond for a sum certain; yet the Court held that it was not a sum certain within the meaning of the Act. Now, can it be said that because the Chief Clerk has found that a sum—now, of course, a "certain sum"—is payable by the Defendants, that it is a debt or sum certain within the meaning of the statute? When was it certain? Was it so before it was ascertained? How can it be said that the money which is ultimately found due in respect of all sorts of work constitutes a debt or sum certain within such meaning? It can only be upon the theory that everything is certain when it is made so—a proposition not disputed—but it is plain that interest is to be payable in respect of a certain instrument, therefore it must be a definite stated sum, mentioned in the agreement itself. It cannot be found in the contract itself what particular sum can possibly be payable under it. To do that, the functions of the engineer must be performed; for it was deputed to him to find out in respect of what works the calculations were to be made. In the case of *In re State Fire Insurance Company* (2), an attempt was made to obtain interest on unpaid instalments of consideration money from the times when they became due, and though the agreement contained no provision for the payment of interest, the Court held that the creditor was entitled to 5 per cent., and that the Court had jurisdiction under 11 & 12 Vict. c. 45, s. 83, to make

(1) 9 B. & C. 919. (2) 2 H. & M. 722; 34 L. J. (Ch.) 58.

calls to raise the amount of such interest; but no interest was payable in respect of the unliquidated balance. The interest that was allowed was upon a debt payable at a fixed time, for which a jury would have given interest at 5 per cent., under 3 & 4 Will. 4, c. 42, s. 28. This Court can give interest in this case, if it feels so disposed, but it must be given under that statute, and in conformity with its provisions. It is quite impossible to say that what is now due to the contractor was certain at any time before the Chief Clerk's certificate was made; therefore, under the statute 3 & 4 Will. 4, it cannot be considered that the sum found due from the Defendants is a debt or sum certain within the meaning of it.

Then, is it material to consider whether the letter of April, 1856, be good for anything or not? It only becomes so if the Defendants fail to make good their first point under the statute. The letter was a claim for the balance of £13,000 odd, "and interest thereon from the respective times when the money ought to have been certified and paid, to the time of payment." What those times are, the Defendants do not know. The Defendants have submitted that the contractor was paid more than he was entitled to in respect of all the works done; but it is certified that a balance remains due from them. How are they to be charged with interest upon anything not paid? The claim was for interest on a "balance" due to the Plaintiffs after they gave credit for the large sum which they had been paid on account, and there is no authority for saying that such a demand is one which the statute contemplates. Such a demand does not comply with either the language or the spirit of the statute. It is therefore submitted that, as to the claim for interest, there was no sum certain which was payable, and that even the £4000 and the £2000—although they were certain in one sense—were thrown into the general account, and have been so treated by the Court.

The decision in *McIntosh* v. *Great Western Railway Company* (2), in regard to interest, is quite inconsistent with the statute 3 & 4 Will. 4, and with all that was perfectly well recognised before that statute was passed, and therefore it ought not to be followed. In his judgment in that case Vice-Chancellor *Stuart* referred to

(1) 4 Giff. 683. 11 Jur. N.S. 681.

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

Calton v. *Bragg* (1), which was decided before the statute, and at a time when the law was somewhat unsettled; but after that case, and even before the statute, the law was perfectly well settled, as the case of *Higgins* v. *Sargent* (2) shews. The Plaintiff in that case recovered in an action on a life policy and claimed interest, but it was not allowed. The Vice-Chancellor referred to the *Duchess of Marlborough* v. *Strong* (3), but there is nothing in that case to support the view that interest ought to have been paid by the *Great Western Railway Company*. The case of *Mildmay* v. *Methuen* (4) was also referred to, but it does not appear there what demand in writing had been made, and yet Vice-Chancellor *Kindersley's* judgment proceeds upon the footing that a proper demand was made. The distinction between that case and the present is obvious enough, for the Plaintiff there carried in a claim for a sum certain, and it was substantially supported and allowed, although with a deduction.

[The VICE-CHANCELLOR referred to *Tew* v. *Lord Winterton* (5).]

That case has no particular bearing on the present. The Vice-Chancellor, in *McIntosh* v. *Great Western Railway Company* (6), considered that these are cases of compensation, and not of account properly so called. If that be so, they are not cases of debts or sums certain. The moment the question is one of compensation as distinguished from one of computation, the claim cannot be brought within the statute as a claim for a debt or sum certain, and at no time before the Chief Clerk's certificate was there any sum certain payable under these contracts. It may be observed that there was an appeal in *McIntosh* v. *Great Western Railway Company*, and that there was a compromise.

[They also cited *Rhodes* v. *Rhodes* (7).]

On the question of costs, we submit that in such a case as this each party ought to pay their own costs, as each has failed to a great extent in their demands: *May* v. *Biggenden* (8).

Mr. *Dickinson*, in reply.

(1) 15 East, 223.
(2) 2 B. & C. 348.
(3) 4 Bro. P. C. 539; 14 Vin. Ab. 458.
(4) 3 Drew. 91.
(5) 1 Ves. 451.
(6) 4 Giff. 683. 11 Jur N S 681
(7) Joh. 653. 6 Jur N S 660
(8) 24 Beav. 207.

SIR CHARLES HALL, V.C.:—

There are two questions remaining to be disposed of in this case, the liability of the Defendants to pay interest to the Plaintiffs on what has been ascertained to be due to them, and the costs of the suit; and both of them are no doubt of considerable importance, from the magnitude of the litigation and the time which it has occupied. As to the question of interest: The Plaintiffs have claimed to be entitled to interest, and they have based their claim to it upon this:—that the contract provided for payments monthly; and that it was contemplated that from time to time certain sums, which would be ascertained at the end of each month, would be paid over, and that therefore the case ought to be considered as one of contract to pay sums at certain specified times, and that interest follows from that. The answer manifestly to that is that to establish a liability to interest it is not ordinarily sufficient to shew that certain sums were to be paid at certain times.

According to the contract, if it went on that, apart from the statute, there must be an express contract for the payment of interest, except in the cases of mercantile contracts—bills of exchange and promissory notes, and some cases which are subject to special usage in trade. It must be in the contract itself, and no case has been made out for interest in that view A case of this kind was, I think, intended to be made by the bill—that, as regarded the liability to interest the Plaintiffs' certificates ought to have been made out from time to time—monthly; that there was default in furnishing the certificates; and that being so, that the Plaintiffs are entitled, not to interest, but to damages of the same amount in respect of the non-payment monthly, in accordance with the contract. That really is the shape of the bill, and viewed as a claim for such damages as distinguished from a direct claim for interest, it does not appear to me that under all the circumstances of the case such claim can be maintained. There was unquestionably great irregularity in the mode of dealing under the contract, which I cannot attribute solely and entirely to the Defendants; and viewing it in that general way, it does not seem to me that the claim to interest is made out under the contract itself. The liability to pay interest, irrespective of the express

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

provisions in the contract and of the statute, has been clearly settled by the cases which were referred to during the argument of Mr. *Lindley*. In one of those cases—*Higgins* v. *Sargent* (1)—the earlier cases were considered and reviewed, for there were earlier authorities in favour of the allowance of interest without express stipulation in the contract. But *Higgins* v. *Sargent* clearly settled the law in that respect, viz., that in the absence of any express provision in the contract to pay interest, there was no liability to do so; and in another of those cases—*Rhodes* v. *Rhodes* (2)—the decision was to the same effect. To those two cases I will add *Foster* v. *Weston* (3). There the Defendants bound themselves by deed to make payments at or on the days actually fixed, and it was held that the instrument did not carry interest. Those being the decisions at law, so far as the contract itself is concerned, they must equally bind me in equity, unless there be decisions in equity entitled to equal consideration with those decisions at law, for this is a case in which the Plaintiffs are asserting and claiming a legal right. They come here on the ground that the accounts could not be conveniently taken in a Court of law; and also on the particular ground that at law the Defendants would have been in a situation to set up that which they are not able to do here—the want of the certificates or the want of authority to execute the works in respect of which special relief is asked. But the Plaintiffs coming here for relief in respect of those impediments at law, and this Court interfering and protecting the Plaintiffs by removing them, the Plaintiffs' rights in this Court must be dealt with exactly the same as they would be at law, and if they could not get interest at law under the contract, they cannot get it in this Court under the contract. It has been contended that there have been decisions in this Court which shew that the Plaintiffs are entitled to interest, and which I cannot disregard. One of the cases referred to is *Mildmay* v. *Methuen* (4). If that case had been, which it is not, so far as I can collect from the report, seriously argued, considered, and decided with reference to the authorities at law, I should have had some difficulty in dealing with it; but it does not appear that a single case was referred to,

(1) 2 B. & C. 348.
(2) Joh. 653.
(3) 6 Bing. 709.
(4) 3 Drew. 91.

and what was relied on was the statute. That case, therefore, is no authority whatever in favour of the Plaintiffs independently of the statute. The case of *McIntosh* v. *Great Western Railway Company* (1) would seem to be an authority independently of the statute. The Vice-Chancellor *Stuart*, however, did not, in his judgment as to interest, refer to the cases which I have already mentioned, but he seems to have gone on some earlier authorities which, in the cases to which I have referred, were reviewed and considered to be no longer applicable at law. Under all the circumstances of that case, and treating this question as one of legal right, I do not consider that that case is an authority in favour of the Plaintiffs for the allowance of interest. I come now to consider the effect of the statute. There are two sections which relate to interest, but the 28th is the material one. In this case there was a "demand of payment" made by the letter which has been referred to. That demand was for a sum of between £13,000 and £14,000 as being due to the Plaintiffs, and it was contended that that was a demand in respect of which interest can be claimed under that section, although the demand succeeded to the extent only of less than half the amount demanded, and although the amount actually awarded and ascertained to be due ultimately was not even altogether part, or simply part, of that sum. That balance was ascertained after an investigation of a very long account, by no means confined to the £13,000 odd and the other items composing it. Independently of any authority on the point, I should have said that this was not a case in which within the meaning of that section there had been a demand made in writing of a sum certain payable at a certain time. In *Mildmay* v. *Methuen* (2), there was a demand for a sum of £10,000 and odd, from which a deduction of £1500 and odd was made on investigation of the accounts, and interest was allowed on the balance. The statute was referred to and was relied on as entitling the claimant to interest, but the argument seems to have been very brief, and the statement of the case and the circumstances under which the reference was made to an architect to ascertain the amount, are not set forth with that amount of detail which would make the decision in the case satisfactory under any circum-

(1) 4 Giff. 683. 11 Jur. N.S. 681 (2) 3 Drew. 91.

V.-C. H. 1874 HILL v. SOUTH STAFFORDSHIRE RAILWAY CO.

stances, and the nature of the deduction is not explained. No authority was referred to, and the judgment of the Vice-Chancellor is not a very full one. The impression on the Vice-Chancellor's mind was that it was a case of a debt or sum certain; and he declared that the claimant was entitled to interest at 4 per cent. from the date of his demand. It does not appear from the report whether it was a debt certain or a sum certain payable at a certain day;—there is not a word about that in the argument, but the Vice-Chancellor seems to have been influenced by the consideration of the 29th section of the statute, which enables the jury on the trial of any issue, or on any inquisition of damages, to give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, and over and above the money recoverable. But that is a special clause applicable to trespass and trover, and to policies of assurance, in reference to which last-mentioned interest had, in the older cases, been allowed. The Vice-Chancellor seems to have considered that the 29th section assisted him in coming to a conclusion upon the construction of the 28th section; but I am at a loss to understand that, for the 29th section does not deal with sums certain at all except in so far as a sum assured may or may not be a sum certain. I do not consider the decision in that case satisfactory, nor one which ought to guide me in coming to a conclusion in this case, if independently of it I should come to a different conclusion, which, under all the circumstances of this case, I certainly should come to. Even supposing that I could treat the present as a case within the 28th section, that section is not imperative; it merely empowers a jury, if "they shall think fit," to allow interest at a rate not exceeding a certain amount. Those words give a discretion to the jury to say whether it be, under all the circumstances of it, a case in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section in a case like the present. I do not believe that any twelve men dealing with and considering all the circumstances of this case, would say that interest ought to be allowed; and, acting as a jury in this case, it appears to me that I cannot allow interest except from the date of the Chief Clerk's certi-

ficate, and it has been conceded that interest must be paid from that time.

As to the costs of the suit: The Plaintiffs have succeeded only to the extent of something less than one-half of their entire demand, but having regard to the nature and circumstances of the case, the way in which the Plaintiffs were met, the contention on the part of the Defendants that the Plaintiffs were entitled to nothing, the decisions in the case of *Jeffryes* v. *Agra and Masterman's Bank* (1) and *May* v. *Biggenden* (2), and the fact that the Defendants have substantially been the cause of the litigation, I am of opinion that they must pay the costs of the suit. Mr. *Buckton* was made a Defendant for the purpose of discovery, and I think under circumstances which entirely justified the Plaintiffs in taking that course; and the Plaintiffs having been ordered to pay his costs, but with a reservation of the question of how they were ultimately to be borne, I shall now order that his costs be added to the costs of the Plaintiffs, and that the Defendants do pay them with the Plaintiffs' other costs of the suit. Then as to the rate of interest to be paid from the date of the Chief Clerk's certificate, Vice-Chancellor *Stuart* thought that 5 per cent. ought to be allowed, and as I consider that this really is a case which ought to be dealt with according to the legal rights, and as I believe that at law it would be given, I shall order that 5 per cent. be now paid by the Defendants from the date mentioned.

Solicitors: Mr. *John Turner*, agent for Messrs. *C. C. Lewis & Son, Brentwood;* Mr. *J. B. Batten*.

(1) Law Rep. 2 Eq. 674. (2) 24 Beav. 287.

M. R.
1874
April 21.

ATTORNEY-GENERAL *v.* COCKERMOUTH LOCAL BOARD.

[1871 A. 131.]

Public Body—Parliamentary Powers—Information—Injury to the Public—Nuisance—Pollution of Stream—Local Board—Sewage Works—Outfall without District—Public Health Act, 1848 (11 & 12 *Vict. c* 63), *ss.* 45, 46—*Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *s.* 4.

Upon an information filed by the Attorney-General to restrain a public body from transgressing powers conferred by an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and in this respect there is no difference between an *ex-officio* information and an information at the relation of a private individual.

The *Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 Vict. c. 61), s. 4, enables local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse":—

Held, that a local board is not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge.

The *C.* local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at the town of *W.*, situated eight miles farther down, and supplied with water for domestic purposes from the river. Upon an information and bill filed by the local board of *W.* (in whom the *W.* waterworks were vested), as relators and Plaintiffs seeking to restrain the *C.* local board from so discharging the sewage, on the ground that their acts were, first, an infringement of the above-mentioned provisions of the *Local Government Act*, 1861, and secondly, a nuisance to the inhabitants of *W.*:—

Held, that upon the information an injunction to restrain the Defendants from infringing the Act of Parliament must be granted with costs; but that the bill, which sought to make out a case of nuisance, must be dismissed with costs.

THIS was a suit by information and bill, in which *John Askew*, the clerk of the *Workington* Local Government Board, was Relator, and the *Workington* Local Board and the said *John Askew* were

M. R.
1874
ATTORNEY-GENERAL
v.
COCKERMOUTH LOCAL BOARD.

Plaintiffs; the *Cockermouth* Local Government Board and their clerk being the Defendants.

The town of *Workington* is situated at the mouth of the River *Derwent*, from which it derives a supply of water for domestic purposes, the waterworks being vested in the local board. The town of *Cockermouth* is situated about eight miles higher up the same river. The *Cockermouth* Local Board had constructed works for removing the sewage of the town with an outfall into the River *Derwent*. This outfall was situated without the district of the *Cockermouth* Local Board. Such works and outfall were constructed by virtue of the powers conferred by the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), and the *Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 Vict. c. 61), the material provisions of which Acts are set out beneath (1).

(1) 11 & 12 Vict. c. 63, s. 45: "The local board of health shall from time to time repair the sewers vested in them by this Act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act; and the said local board may carry any such sewers through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage way of any street, and after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through, or under any lands whatsoever; and the said local board may from time to time enlarge, lessen, alter, arch over, or otherwise improve all or any of the sewers vested in them by this Act, and discontinue, close up, or destroy such of them as they may deem to have become unnecessary: Provided always, that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance; and if by reason thereof any person is deprived of the lawful use of any sewer, the said local board shall provide some other sewer as effectual for his use as the one of which he is so deprived."

Sect. 46: "The local board of health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or underground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance."

24 & 25 Vict. c. 61, s. 4: "Local boards may exercise the powers given by the 45th section of the *Public Health Act*, 1848, also without their district, for the purpose of outfall or distribution of sewage, upon making due compensation, to be settled in the manner provided in the 144th section of the *Public Health Act*, 1848: Provided always, that nothing herein contained shall give or be construed to give power to any

M. R. 1874 ATTORNEY-GENERAL v. COCKERMOUTH LOCAL BOARD.

The Relator and Plaintiffs alleged that the *Cockermouth* Local Board were using the outfall into the River *Derwent* for the purpose of conveying the sewage and filthy water from the town of *Cockermouth* into that river without first freeing such sewage and filthy water from all excrementitious and other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse; and that such acts, and others committed by the said board, were a serious nuisance, and, if continued, would injuriously affect the health and comfort of the inhabitants of the town of *Workington*; and they prayed for an injunction to restrain the *Cockermouth* Local Board from so doing.

The cause now came on to be heard.

The evidence shewed that, although the water of the *Derwent* was more or less polluted in the neighbourhood of the outfall, chemical analysis failed to detect any pollution in water taken from the river at the intake of the *Workington* waterworks. Dr. *Frankland*, of the *Royal College of Chemistry*, one of the Rivers Pollution Commissioners, and the principal scientific witness for the Plaintiffs, deposed with reference to this as follows:—"No sewage can be admitted into a river without deteriorating the quality of the water. The deterioration for washing and manufacturing purposes may be, as in this case, insignificant or imperceptible; but for drinking and cooking such water becomes dangerous, because, as the Rivers Pollution Commissioners have shewn, the sewage matter is not perceptibly altered in its character by a flow of seven miles, and scarcely diminished in quantity. Neither does the failure of chemical analysis to detect any deleterious ingredient indicate that danger is absent, since the nature of the noxious ingredients which propagate small-pox, scarlet fever, typhoid fever, or cholera is unknown, and chemical analysis is therefore powerless to detect these ingredients. Moreover, as I proved in 1866, when I published the results of my experiments in the weekly return of

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local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse."

the Registrar General, chemical analysis cannot distinguish between pure river water and the same water after it has been mixed with 1000th of its volume of the dejections of a man dying of cholera; although there can be no doubt that the prevalence in *Cockermouth* of epidemics which are propagated by water, such as cholera or typhoid fever, would seriously imperil the health of the inhabitants of *Workington*, who would thus be made to drink in a diluted form the dejections of the diseased persons."

The Defendants adduced some evidence tending to shew that these views of Dr. *Frankland* were not shared by other scientific men.

Mr. *Southgate*, Q.C., Mr. *Speed*, and Mr. *Parkin*, for the Relators and Plaintiffs, submitted that they were entitled to a decree on the information, the evidence clearly shewing that the Defendants discharged sewage into the River *Derwent* in total disregard of the provisions of the *Local Government Act* (1858) *Amendment Act*, 1861, s. 4. They also contended that, on the evidence, the Plaintiffs were entitled to an injunction on the ground of nuisance.

The MASTER OF THE ROLLS expressed his opinion that no case of nuisance was made out, and called on the counsel for the Defendants only as to the case made upon the information, and the costs of the bill.

Mr. *Fry*, Q.C., and Mr. *Davey*, for the Defendants:—

This case, so far as it is founded on nuisance, is exactly within *Attorney-General* v. *Mayor of Kingston* (1), and the bill ought, therefore, to be dismissed with costs.

Then as to the information. If the outfall were within the district of the *Cockermouth* Local Board, there would be no ground whatever for the interference of the Court at all As the outfall is beyond their district, the board are subject to the proviso contained in sect. 4 of the *Local Government Act Amendment Act*, 1861. Now if Dr. *Frankland's* theory be true, it is impossible to discharge sewage into any natural watercourse without contravening that proviso; and if so, the proviso is simply void. The Court, however,

(1) 34 L. J. (Ch.) 481. 11 Jur. N.S. 596

M. R. 1874 ATTORNEY-GENERAL v. COCKERMOUTH LOCAL BOARD.

will endeavour to put a reasonable interpretation on the clause, and we submit that all that the *Cockermouth* Local Board are bound to do is to take care that the water of the *Derwent*, as a whole, is not deteriorated; there must not be such deterioration of the water as to amount to a nuisance as defined in *Walter* v. *Selfe* (1).

[The MASTER OF THE ROLLS referred to sect. 46 of the *Public Health Act*, 1848, and to *Attorney-General* v. *Leeds Corporation* (2), as shewing that the local board could not in any case create a nuisance.]

We say that although this may be so, still the proviso, when fairly construed, means no more, and it may have been inserted *ex majori cautelâ*.

Even if a stricter interpretation is given to the clause, the Court will not interfere unless some damage is proved, and there is no proof of any here.

[The MASTER OF THE ROLLS:—In *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (3) an information was filed to restrain the company from working one line of rails, the Act of Parliament providing that there should be two. I was one of the counsel for the company, and our defence, which we fully proved, was, that a single line of railway could be worked with safety and great advantage, and had been worked for months without an accident; but the Court held that that question was one for the Legislature, and decided against us.]

In that case the information was *ex-officio*.

[The MASTER OF THE ROLLS:—Except for the purposes of costs, there is no difference between an *ex-officio* information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriæ*, sues by the Attorney-General.]

The Sovereign sues on behalf of the public; but if the public is not injured, the suit cannot be maintained. Suppose this were the case of a mountain brook, of the water of which no human being ever drank, with not even a house in the neighbourhood, could a suit at the instance of the Attorney-General be main-

(1) 4 De G. & Sm. 315, 322. (2) Law Rep. 5 Ch. 583.
(3) 2 W. R. 330.

tained? The cases of *Attorney-General* v. *Mayor of Kingston* (1) and *Attorney-General* v. *Gee* (2) shew that the Attorney-General, suing at the relation of a private individual, must prove damage.

SIR G. JESSEL, M.R.:—

The Defendants in this case are a public body authorized by Act of Parliament to construct sewage works so that they shall not be a nuisance. Under the powers originally conferred on them, they could not make outfall works outside their district, but a subsequent Act of Parliament enabled them to go outside their district; that is to say, they may now take people's lands, and so on, and do what certainly is very likely to be unpleasant to the inhabitants of another district which is not benefited by the works. But these powers are subject to this proviso:—[His Honour read sect. 4 of the *Local Government Act Amendment Act*, 1861.] I do not mean to say that clause might not by possibility have been better drawn or expressed, but I think the meaning is pretty plain, and it means this: "You shall not send your sewage water into a natural stream until you have made it wholesome water—until you have got rid of all the noxious matter in it." That, I think, is the effect of the clause, and if that is the meaning, the next point is, what water is it that is not to be affected or deteriorated? You are not to affect or deteriorate the water in the river: what portion of the water? I cannot accede to the argument of the Defendants that it merely means that you must not poison the whole river; for a river may be hundreds of miles long. I think it must mean that you are not to affect or deteriorate the water in the river at the point where the outfall is; and that if you at that point pollute the water you shall not enjoy the privilege given to you by this Act of Parliament of making an outfall outside your district. The Act gives you a privilege, and gives it on these terms.

The next question is a question of fact, and there really is no contest upon it. There are several witnesses on behalf of the informant who say that at various times—fifteen times in all within about a year—they have gone and seen the sewage fall directly into the river without passing through the tanks in which it is

(1) 34 L. J. (Ch.) 481. (2) Law Rep. 10 Eq. 131.

L. R. 1874 ATTORNEY-GENERAL v. COCKERMOUTH LOCAL BOARD.

supposed to be purified; and even where it does pass through the tanks, no witness on the part of the Defendants will say the water is pure; the witnesses for the Defendants all speak with certain very remarkable qualifications, such as "practically," or some word of that kind, or some qualification or other. Nobody says that the sewage does not deteriorate the quality of the water at that place, and there is really no contest about the matter.

In that state of the case I am of opinion that the Defendants have infringed the terms of the Act of Parliament, and that if they take the privilege at all they can only take it subject to such terms as are imposed by the Act of Parliament.

Then this is an information by the Attorney-General against a public body, to enforce the terms of a public Act of Parliament. Now, if I understand the law upon the subject, it is not necessary for the Attorney-General to shew any injury at all. The Legislature is of opinion that certain acts will produce injury, and that is enough. The case I have already referred to of the *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1), is in point; there the Attorney-General would not even answer the affidavits of the Defendants to shew there was no injury caused by the proceedings they were adopting. The Legislature is of opinion that it is desirable to preserve our natural streams in at least their present state of purity; it therefore has said that you shall not affect or deteriorate the water at all; and the Court must assume that the deterioration of the water is an injury which is prohibited by the Legislature for good and sufficient cause.

Again, if I look at the evidence in the case, I can see very good reason for the course adopted by the Legislature. We had the evidence of scientific men to this effect, that there is always a probability of danger when sewage matter is thrown into a stream, because people may drink of that stream, and if any epidemic disease is prevalent in a town from which the sewage matter proceeds, that disease may be communicated to the inhabitants of another town by the water. Well, that alone would be sufficient justification for the Legislature, if it entertained that opinion, inserting this enactment in the Act of Parliament. That being

(1) 2 W. R. 330.

M. R.
1874
ATTORNEY GENERAL
v.
COCKERMOUTH LOCAL BOARD.

so, I think I am bound, as regards the information, to grant an injunction to restrain the Defendants from infringing the provisions of the Act of Parliament.

The bill stands upon a totally different footing. It is a bill by the Local Board of *Workington*, alleging nuisance committed by the Defendants. Now I must say I cannot find any evidence of nuisance caused by the Defendants' acts. The sewage is thrown into the river in comparatively small quantities, at a distance of eight or nine miles from the town of *Workington*. The water has been carefully analysed at the intake at *Workington*, and no trace of the sewage can be discovered; that is to say, from some cause or other that which was polluted water at or near the outfall has ceased to be polluted water by the time it arrives at *Workington*. That I take to be the effect of the evidence, and if the Plaintiff board can only sue on the ground of nuisance, and they cannot prove nuisance, it follows that their bill must be dismissed. The only remaining question is one of costs. Both parties are public bodies, and I cannot see why I should make the *Cockermouth* people pay costs incurred wrongly by the *Workington* people, or *vice versâ*. I think the right course, therefore, is to dismiss the bill with costs, and to grant the injunction on the information also with costs, leaving the Taxing Master to set off one against the other. This course has in these cases the effect of giving the bulk of the costs really to the party which obtains the decree. That, however, is for the Taxing Master and not for me.

The injunction will follow exactly the terms of the Act of Parliament.

Solicitors: Messrs. *Wood & Tinkler*, agents for Mr. *Tom Millburn, Workington;* Messrs. *Bischoff, Bompas, & Bischoff*, agents for Mr. *Edward Waugh, Cockermouth.*

M. R.
1874
Feb. 18.

CROSSLEY *v.* MAYCOCK.

[1874 C. 21.]

Vendor and Purchaser—Specific Performance—Conditional Acceptance—Conditions of Sale.

7 Ch D. 30.
3 App Cas 1118

Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows: "Which offer we accept, and now hand you two copies of conditions of sale," and therewith inclosed a formal agreement with conditions of a special character:—

Held, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers.

DEMURRER.

This was a suit by vendors for the specific performance of a contract for the sale of land.

The bill alleged that the Defendants offered to purchase the plot of land in question by a letter dated October, 1873, which was in the following terms:—

"We beg to submit our offer for the plot of land on the east side of *Tuel Lane*, viz., £2 per yard superficial; the purchase to be completed and possession given up on or before the 21st of Jan. 1874":

That the Plaintiffs sent the following answer to the Defendants, dated the 27th of October, 1873:—

"We are in receipt of your note offering us £2 per superficial yard for the plot of land on the east side of *Tuel Lane*, which offer we accept, and now hand you two copies of conditions of sale, which we have signed; we will thank you to sign same, and return one of the copies to us":

That the conditions of sale referred to in the above letter (which were set out in the bill) were prepared in duplicate, signed by the Plaintiffs, and inclosed with the letter to the Defendants, and after reciting that the Plaintiffs had agreed to sell and the Defendants to buy the piece of land therein described, various stipulations were made as to the delivery of the abstract, the time within

which objections should be made to the title, and the time when the purchase should be completed:

That the Defendants did not sign the agreement containing the conditions of sale, and that they subsequently refused to complete the contract.

The bill prayed a declaration that the said two letters created a binding contract for the sale and purchase of the said plot of land, which ought to be specifically performed.

Mr. *Southgate*, Q.C., and Mr. *North*, in support of the demurrer.

Mr. *Fry*, Q.C., and Mr. *Jolliffe*, in support of the bill, contended that the two letters constituted a binding contract, and that the reference in the Plaintiffs' letter to the conditions of sale did not render the acceptance of the Defendants' offer a qualified acceptance: *Fowle* v. *Freeman* (1); *Gibbins* v. *Board of Management of Metropolitan Asylum District* (2): *Skinner* v. *M'Douall* (3); *Chinnock* v. *Marchioness of Ely* (4).

SIR G. JESSEL, M.R.:—

The only question in this case is, what is the true construction of the letter of the Plaintiffs of the 27th of October, 1873. The Defendants had written to the Plaintiffs, offering to purchase the land in question, to which the Plaintiffs replied as follows:—

"We are in receipt of your note offering £2 per yard for the plot of land, which offer we accept, and now hand you two copies of conditions of sale, which we have signed; we will thank you to sign same, and return one of the copies to us."

The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party

(1) 9 Ves. 351.
(2) 11 Beav. 1.
(3) 2 De G. & Sm. 265.
(4) 4 D. J. & S. 638.

M. R. 1874 CROSSLEY v. MAYCOCK.

making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce.

Here the allegation is that the agreement was subject to certain conditions of sale, which were very special, and such as no purchaser would be bound to accept under an open contract. I am of opinion that the acceptance was only conditional, and that there was no final contract.

The demurrer must be allowed.

Solicitors for the Plaintiffs: Messrs. *Bower & Cotton*, agents for Mr. *F. Jubb, Halifax.*

Solicitors for the Defendants: Messrs. *Pritchard, Englefield, & Co.*, agents for Messrs. *Grundy & Kershaw, Manchester.*

M. R. 1874 *April* 25.

LACEY *v.* HILL.

[1870 L. 94.]

CROWLEY'S CLAIM.

Principal and Agent—Stockbroker—Insolvency of Principal—Default of Broker on Stock Exchange—Closing of Account—Indemnity of Broker—Custom of Stock Exchange.

4 QBD. 604. 18 CLD 538

By the usage of the *London Stock Exchange* stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business.

In equity an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal.

Messrs. *C.*, brokers on the *London Stock Exchange*, on behalf of Sir *R. H.*, entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to Sir *R. H.* to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and the value thereof at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir *R. H.* promised to pay, and directed them to deal with the stocks as they thought best, and they sold part and continued part. Sir *R. H.* did not pay on the 15th, but shot himself; on the

next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. *C.* were (solely by reason of Sir *R. H.'s* failure to pay them) declared defaulters on the *Stock Exchange*, and ceased to be members of that body, and, in accordance with the rules, all their transactions for Sir *R. H.* were closed, and all the stocks they had continued for Sir *R. H.* were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir *R. H.* was thus largely increased. The stocks afterwards continued to fall in value. Messrs. *C.* afterwards paid 6*s.* 8*d.* in the pound on their *Stock Exchange* debts, and were re-admitted as members of the *Stock Exchange*:—

Held, that the sale was justifiable, both under the usage of the *Stock Exchange* (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of Sir *R. H.* that he would pay on the 15th:

Held, also, that although Messrs. *C.* had not paid their debts in full, they were entitled to prove against Sir *R. H.'s* estate for the increased balance appearing due to them after the sales were effected.

MESSRS. *CROWLEY* were brokers on the *London Stock Exchange*, and had been employed in that capacity by Sir *Robert Harvey*, a banker at *Norwich*. Prior to July, 1870, they had bought for him, on the *Stock Exchange*, large quantities of Spanish and other stocks, and from time to time, according to his orders, re-sold part of the stocks so bought; but they never themselves actually took off the market or paid for any of such stock. On the 12th of July, 1870, Messrs. *Crowley* had entered into contracts for the purchase of a large quantity of such stock, to be completed on the next settling-day, Friday, the 15th of July, 1870. Being personally liable on these contracts, and anxious as to the fulfilment of them, they, on the 12th of July, wrote to Sir *Robert Harvey* a letter from which the following is an extract:—

"The position is simply this. We depend entirely on you; if you pay us in full on Friday, we can face our other difficulties, but if you do not we cannot stand. Hence the tone of our last two or three letters.

"If we had to succumb it would necessitate the closing of your account at perhaps an unfortunate moment, and your name would be divulged, a thing we very much dread having to do.

"It is also necessary we should know to-morrow morning early how affairs are to go. If we are to continue we must do it boldly, and we cannot do that if we are in any doubt about being able to pay up differences on Friday.

M. R.
1874
LACEY
v.
HILL.
CROWLEY'S CLAIM.

"We look to you therefore to come, or write, or telegraph an assurance to support, or directions to close, as the case may be. For your guidance we have gone through your account, and at to-night's closing prices the differences due from you would be about £20,000; to-morrow may alter that."

On the following day, the 13th of July, Sir *Robert Harvey* sent, in reply to Messrs. *Crowley's* letter, a telegram in the following terms:—"Do just what suits you best; I will settle all you say on Friday morning."

Acting on this telegram, Messrs. *Crowley*, on the 13th of July, closed the transaction as to part of the stock they had contracted to purchase by selling such part for the 15th of July; and they "continued" the contracts as to a further part of the stock. According to the practice of the *Stock Exchange*, such continuation is effected by the vendor of the stock (in consideration of a payment to him by the purchaser) entering into two contracts with the purchaser; one a contract for the purchase of the same amount of stock as he has contracted to sell (such contract to be completed on the next settling-day, so as to cancel the subsisting contract), and the other, a fresh contract for the sale of the same amount of stock, to be completed on the settling-day next but one, which in the present case was the 30th of July.

On the same 13th of July, Messrs. *Crowley* by letter informed Sir *Robert Harvey* what stocks they had sold and continued respectively, and advised him to sell a still further portion of the stocks. At the same time they sent him a statement of account, by which it appeared that, taking the stocks they had contracted to buy on his account at the price of the day, he was indebted to them to the amount of £15,912 12*s.* 1*d.*

On the 14th of July Sir *Robert Harvey* sent to Messrs. *Crowley* a telegram, directing them to sell a further portion of the stocks, and also promising to settle all on Friday morning. Messrs. *Crowley* sold part of the stock mentioned in this telegram, but did not sell the rest in consequence of a heavy fall (of 8 or 9 per cent.) taking place in the price thereof, and they referred to Sir *Robert Harvey* for further instructions on the subject.

Sir *Robert Harvey* did not give any further instructions or fulfil his promise to pay Messrs. *Crowley* on the 15th of July, but shot

himself on the afternoon of that day. On the 16th of July his bank stopped payment. On the 19th of July he died.

Messrs. *Crowley*, in consequence of Sir *Robert Harvey's* failure to make the promised payment, and (as appeared by the evidence) in consequence of that alone, were, on the 16th of July, declared defaulters, and in accordance with the rules (1) of the *Stock Exchange* all their transaction were peremptorily closed, and their accounts made up by the official assignees at the price current on that day. Such price current was less than that of the 13th of July, and the result was that the balance appearing by their books against Sir *Robert Harvey* was increased to £20,482 17*s.* 4*d.*

Messrs. *Crowley* subsequently paid 6*s.* 8*d.* in the pound on their *Stock Exchange* debts, and they assigned the sum of £7101 18*s.* 2*d.*, part of the debt due to them from Sir *Robert Harvey*, to trustees, for their *Stock Exchange* creditors; and in October, 1870, they were re-admitted members of the *Stock Exchange.*

The rules of the *Stock Exchange* do not define the effect of re-admission. Mr. *De Zoete*, the chairman of the committee of the *Stock Exchange*, gave evidence to the effect that re-admission is not

(1) The following are the material rules:—

"142. A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy-chairman, or any two members of the committee.

"143. A member declared a defaulter on the *Stock Exchange* . . . . ceases to be a member."

"156. A defaulter shall not be eligible for re-admission who shall not have paid from his own resources, independently of his security money, at least one-third of the balance of any loss that may occur on his transactions, whether on his own account or that of principals; or who, in the event of his debts being less than the amount which his sureties may be called upon to pay, shall not have refunded to the sureties one-third of the amount paid by them."

"167. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings; to enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the direction of the majority of the creditors present."

"169. The official assignees shall publicly fix the prices at which a defaulter's transactions shall be closed, such prices to be those current in the market immediately before the declaration; but, in the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

M. R. 1874 LACEY v. HILL. CROWLEY'S CLAIM.

equivalent to a legal discharge of *Stock Exchange* debts; that there is no discharge except by payment of all liabilities in full; that one member is not allowed to sue another member without the permission of the committee; but that every year upon the re-admission of members the committee specially considered the position of members who had been declared defaulters, and if they thought that the member was in a position to make some further payment, they intimated their opinion to him; and that it thus practically resulted from the action of the committee that payments were from time to time made by members according to their ability towards the liquidation of old liabilities.

The suit of *Lacey* v. *Hill* was instituted by creditors for the administration of Sir *R. Harvey's* estate, and Messrs. *Crowley* carried in a claim in the suit, against the estate, to the amount of £20,482 17*s.* 4*d.* This claim was not disputed to the extent of £15,912 12*s.* 1*d.*, being the amount appearing to be due from Sir *Robert Harvey*, by the account rendered to him on the 13th of July. The validity of the residue of the claim now came before the Court on an adjourned summons.

It appeared from the evidence that where the principal of a broker on the *London Stock Exchange* has, by reason of insolvency, bankruptcy, or death, become unable to receive and pay for, or to deliver the stocks and shares which he has ordered to be purchased or sold, and no one is authorized to deal with the account, or able and willing to take the responsibility thereof, then the broker (who as between himself and other members of the *Stock Exchange* stands in the position of principal, and is liable as such on all contracts for the sale and purchase of stocks and shares), may, by the usage and custom of the *Stock Exchange*, proceed at the earliest practicable period to close the account of such insolvent principal by selling on the best terms amounts of all stocks or shares equivalent to those he may have contracted to take, and by purchasing amounts of all stocks or shares equivalent to those he may have contracted to deliver.

It appeared that the stocks contracted to be purchased by Messrs. *Crowley* on Sir *Robert Harvey's* account continued to fall after the 16th of July, and that if a sale had been postponed until

after the 30th of that month (the settling-day next after the 15th), the amount of the claim would have been greater.

Contract notes relating to all the stocks purchased or continued on Sir *R. Harvey's* account were duly forwarded to Sir *Robert Harvey*. These notes were not in evidence, but it was stated at the Bar that they were expressed to be subject to the rules and usages of the *London Stock Exchange*. It was agreed that the contract notes should be formally put in evidence before the order was drawn up, and the judgment was given on the assumption that this would be done.

The *Attorney-General* (Sir *R. Baggallay*), and Mr. *Dundas Gardiner*, for Messrs. *Crowley*, relied on the decision in *Scrimgeour's Claim* (1) as governing the present case.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the legal personal representative of Sir *Robert Harvey* :—

This case is distinguishable from *Scrimgeour's*. There the stock which was the subject of the claim had been actually bought and taken off the market; and the Lords Justices held that, under the circumstances, brokers had authority to sell the stock. Here everything rested in contract, and Messrs. *Crowley* would not have been in the like position with Messrs. *Scrimgeour* until the 31st of July. They actually sold on the 16th, and it is nothing to the purpose to allege that if they had sold on the 31st of July we should have been in a worse position.

[The MASTER OF THE ROLLS :—The latter part of Lord Justice *Mellish's* judgment seems exactly to cover that point and to decide it against you.]

We submit that that judgment must be read with reference to the circumstances of the particular case then before the Court, which, as has been pointed out, are different from those of the present case.

Further, the moment Sir *Robert Harvey* failed to fulfil his promise, the brokers should have elected to sell; if they had done so, the loss would only have amounted to £15,912 12*s.* 1*d.*, which we are willing to pay.

(1) Law Rep. 8 Ch. 921.

M. R. 1874 LACEY v. HILL. CROWLEY'S CLAIM.

[The MASTER OF THE ROLLS:—At that time they had agreed to continue the account; they could not leave such a matter as that to the last moment.]

Messrs. *Crowley* do not bring themselves even within the terms of the rule of the *Stock Exchange*, if that be valid. The sale took place on the 16th of July, at that time Sir *Robert Harvey* was not dead, nor had he become bankrupt or insolvent; in fact, it is not certain even now whether his estate may not prove sufficient for payment of all his debts in full.

Again, the case of *Duncan* v. *Hill* (1) shews that the claim is in the nature of one for indemnity, and although it is sworn in the present case that the claimants' loss has been exclusively caused by the default of Sir *Robert Harvey*, still they can only recover what they have actually paid, and not the whole amount for which they were liable previously to their re-admission to the *Stock Exchange*. It would have been different, perhaps, if Sir *Robert Harvey* had entered into a covenant to indemnify them: *Parker* v. *Lewis* (2); but here the indemnity is only implied.

[The MASTER OF THE ROLLS referred to *Cruse* v. *Paine* (3).]

Mr. *Southgate*, Q.C., and Mr. *Merewether*, for the Plaintiffs in the suit, referred to *Collinge* v. *Heywood* (4), as shewing that payment and not mere liability, was required in order to maintain an action on a contract of indemnity. If a mere liability were enough, the party recovering might afterwards compromise for less than he recovered.

SIR G. JESSEL, M.R.:—

Assuming that the contract notes are produced and verified, I think that the claimants have made out their case.

The case is simply this: Messrs. *Crowley* were the brokers of Sir *Robert Harvey*. In that capacity they bought for him various stocks, Spanish stock amongst the rest; and from time to time, according to his orders, sold the stock. On the 13th of July he owed them some £15,000 on the balance of account; that is, if they had sold all the stock which they had bought for him at the

(1) Law Rep. 8 Ex. 242.
(2) Ibid. 8 Ch. 1035; see p. 1058.
(3) Law Rep. 6 Eq. 641.
(4) 9 A. & E. 633.

market price of the day he would have been indebted to them in that amount. They found that they were in this position, that unless Sir *Robert Harvey* paid them they would be defaulters on the *Stock Exchange*, and therefore they wrote to him, saying in effect: "The settling-day is Friday, the 15th July, and unless you pay us on that day we shall be defaulters. But if you agree to pay us on that day we can go on with our business, and if you will agree to pay us on that day we will either then continue your account" (which is done by entering into a new series of sales and purchases, that is, they contract to sell what stocks they have bought, and then contract to buy equivalent quantities)—"we will either continue your account or sell, as you think best." He telegraphed that they should sell part; but as to the rest they were either to continue or sell as they pleased, and at the same time he stated that he would pay on the Friday. That of course was a representation on which they could act. They had told him that as honest men they could not continue unless he paid, and that if he did not pay they should be defaulters. He represented that he would pay; and on the strength of that representation they continued a portion of the stocks. He did not pay on the 15th, but made an attempt at suicide. On the 16th they were declared defaulters; that is, they made default on the 15th, and on the 16th they were declared defaulters, and in the usual course their creditors, acting under the *Stock Exchange* rules, closed their accounts, that is, sold all the stocks they had contracted to buy, including the stocks they had contracted to buy for Sir *Robert Harvey*.

The first question I have to decide is, was such a sale authorized? It was said the only authority Messrs. *Crowley* had was to purchase for the next account day, the 30th, and they had no right therefore to sell before that day. I admit that their right to sell before that day is not a right ordinarily possessed by an agent who has contracted to buy for delivery on a future day. I think the right depends on two grounds, and that it is well warranted on both. The first ground is that they did not agree to continue except on the representation by Sir *Robert Harvey* that he would pay on the Friday. He left them to continue or not, knowing they could not continue unless they relied on that representation, which

M. R. 1874 LACEY v. HILL. CROWLEY'S CLAIM.

he failed to perform. I agree with Mr. *Fry's* observation that under that right they were bound to sell soon afterwards, that they had not the right to sell at any future time they pleased; but the sale took place next morning, and so no time was really lost.

I think they had also a right to sell on another ground. By the rules and usage of the *Stock Exchange* if the principal dies or becomes insolvent during the currency of the account the broker has a right to sell immediately. It appears that these rules and usages were expressly part of the contract, not only as between the brokers and jobbers from whom Messrs. *Crowley* purchased, but as between themselves and Sir *Robert Harvey*, and I have no doubt in this particular instance were perfectly well known to him. What is the meaning of the client becoming insolvent in the sense of the rules? It is the simple meaning of insolvency as between business men. What happened was this. Sir *Robert Harvey* attempted to commit suicide on the afternoon of Friday. He was principal partner of the bank at *Norwich*, and that bank put up its shutters on the next morning and did no more business. It was soon noised abroad that the bank was insolvent, and so the members of the *Stock Exchange*, people who were interested, were informed. This turned out to be the fact. I am asked to say that that is not evidence of the insolvency of Sir *Robert Harvey*. Insolvency within the *Stock Exchange* rule means inability to pay debts in the ordinary commercial sense and in the ordinary course of business. Then what is to be said of a bank that puts up the shutters and does not pay? Is not that evidence of insolvency? I hardly know how else a jury exercising the ordinary common sense which is to be attributed to juries could find anybody insolvent unless he came forward and shewed that the whole amount of his assets was not equal to the whole amount of his liabilities. I think there was very good evidence, and such evidence as entitled the brokers to act upon it, and therefore they had the right to sell on the second ground also.

Then it is said the brokers made default, and that they have not paid for the stock they purchased for Sir *Robert Harvey*. But if he has had the stock sold for him, and is credited with the proceeds, what difference can it make to him whether the brokers paid for it, or whether the persons who sold it have chosen to give them

credit for the amount? He has had the stock, and he has had it sold for him; that is, he has been credited with the proceeds. Suppose a man buys a horse or a cargo of corn for his principal, and before the day of the delivery sells, crediting the principal with the proceeds in account, then although the principal has not the thing delivered to him he has the benefit of the sale by being credited with it in account. It appears to me that that is the true view of the present transaction, and it is utterly immaterial whether the broker who has become personally liable for the amount has paid at all. But in addition to this it appears to me the case of a defaulter on the *Stock Exchange* differs from the case of a bankrupt by the English law. Such a defaulter obtains no discharge from his debts. All that happens is this, unless he pays 6*s.* 8*d.* in the pound he is not admitted into the *Stock Exchange* again, and remains liable to actions by all his creditors. If he pays 6*s.* 8*d.* in the pound and is re-admitted, then the *Stock Exchange* committee will not allow any member of the *Stock Exchange* to sue him without their permission. The object of this is to secure that his assets shall be fairly distributed, and as I understand it, every year a man who has been a defaulter is called upon to shew whether he can pay any more, and if he can pay any more he does so till he liquidates the the whole debt. So that in point of fact if these gentlemen recover in this suit they will actually have to distribute what they recover amongst their creditors on the *Stock Exchange,* and will be in no wise released from the payment.

Last of all it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary,) it is quite plain that in this Court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him. As to the observation that he may compromise for less, the answer is, that the person liable to indemnify can go

M. R. 1874 LACEY v. HILL. CROWLEY'S CLAIM.

to the creditor and set him right. It is his own fault that the liability remains. But he is certainly in equity liable to indemnify, and liable to indemnify to the extent of the liability incurred by the agent on his behalf, and that is quite sufficient to substantiate this proof against this estate.

Therefore, on these grounds I shall allow the whole proof, and of course with costs.

Solicitors: Messrs. *Travers Smith & Co.*; Messrs. *Sharpe, Parkers, & Co.*, agents for Mr. *Coaks, Norwich*; Messrs. *Linklater & Co.*

M. R. 1874 *March* 7.

STEED *v.* PREECE.

[1868 S. 1.]

Real Estate—Conversion—Infant Tenant in Tail—Sale by Court of Infant's Real Estate—Death of Infant—Devolution of Proceeds of Sale.

Real estate was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross remainders between them. A suit was instituted by the trustees against the *cestuis que trust* for the administration of the trust, and a decree was made after one of the infants had attained twenty-one, by which (the Court being of opinion that a sale would be for the benefit of the infant Defendant, and the adult Defendant consenting) a sale was ordered. A sale was made under the decree, and the purchase-money paid into Court; and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one:—

Held, that the fund in Court belonged to his legal personal representative, and was not to be treated as realty.

Flanagan v. *Flanagan* (1) followed.

Jermy v. *Preston* (2) and *Cooke* v. *Dealey* (3) questioned.

BY an indenture dated the 29th of May, 1857, certain real estate was assured unto and to the use of *Francis Davis* and *Sarah Preece*, their heirs and assigns, in trust for *John Preece* and *Edward Edwin Preece*, and the heirs of their respective bodies, in equal shares as tenants in common; and if either of them should die

(1) Cited in *Fletcher* v. *Ashburner*, 1 B. C. C. 498.

(2) 13 Sim. 356.

(3) 22 Beav. 196.

without issue, then as to the entirety of the premises for the other of them and the heirs of his body; and if both should die without issue, then as to part of the real estate in trust for *Sarah Preece* for life, and after her death for *Francis Davis*, his heirs and assigns, and as to the residue of the same real estate upon trust for *Francis Davis*, his heirs and assigns.

Both *John Preece* and *Edward Edwin Preece* were illegitimate, and at the date of the deed were infants aged ten and two years respectively.

Francis Davis died in 1866. In 1867 *Sarah Preece* intermarried with *John Steed*.

In January, 1868, Mr. and Mrs. *Steed* filed the bill in this suit against *John Preece* and *Edward Edwin Preece*, praying that the trusts of the indenture might be administered by the Court; that proper directions might be given as to the letting and management of the trust property; that if it should appear to the Court necessary or expedient a partition of the trust property between the Defendants might be directed; and that provision might be made for the costs of the suit.

John Preece attained twenty-one on the 3rd of January, 1868. On the 19th of June, 1868, a decree was made which, after declaring that the trusts ought to be administered, decreeing accordingly, and directing an account of the rents and profits, proceeded as follows:—"And his Lordship being of opinion that it will be for the benefit of the infant Defendant that the premises comprised in the said indenture should be sold, and the Defendant *John Preece* consenting thereto, doth order that the same be sold with the approbation of the Judge, the Defendant *John Preece* being at liberty to bid and become the purchaser thereof; and it is ordered that the money to arise from such sale be paid into the bank, with the privity of the Accountant-General of this Court, to the credit of this cause, *Steed* v. *Preece*, 1868 S. 1. And his Lordship doth declare that the costs of the said infant Defendant are to be a charge upon his share of the said premises. And the further consideration of this cause is adjourned, and any of the parties are to be at liberty to apply as they may be advised."

The property was sold under this decree, and the purchase-money was paid into Court.

M. R. 1874 STEED v. PREECE.

By an order made in the suit on the 19th of December, 1868, it was ordered that the costs of the suit of the Plaintiffs and Defendants should be taxed, including in the costs of the Defendant *John Preece* the costs of inrolling the conveyances of the property to the purchasers; that such costs, when taxed (except the said costs of inrolling the conveyances) should be paid out of the purchase-money in Court; that out of one equal moiety of the residue of the said purchase-money the costs of inrolling the conveyances should be paid, and that the residue of the said moiety should be paid to the Defendant *John Preece;* and that the remaining moiety of the purchase-money should be invested in bank annuities in trust in the cause, "the account of the infant Defendant *Edward Edwin Preece*;" and that the dividends to accrue on such bank annuities be paid to the guardian of the infant Defendant, and be applied towards his maintenance; and liberty to apply was given.

A moiety of the fund remaining after payment of costs was accordingly invested in bank annuities and carried to the account directed by the last stated order. The other moiety was paid out to *John Preece.*

Edward Edwin Preece died on the 6th of January, 1874, without having attained twenty-one, and without issue.

On the 9th of February, 1874, *John Preece* executed a deed (which was afterwards inrolled in Chancery), whereby he purported to bar his estate tail in the said fund in Court; and he now presented a petition asking for payment of the fund to himself.

By direction of the Court, the petition was served on the Attorney-General.

Mr. *Blackmore*, for the Petitioner:—

The sale of the estate under the order of the Court could not alter the devolution of the property. In the first place, I contend that the sale was wholly unauthorized, the Court having no jurisdiction to sell purely for the benefit of the infant: *Calvert* v. *Godfrey* (1); if so, the right of the petitioner is quite clear. The sale, however, appears to have been made for the purpose of raising costs, in the same way as sales were ordered in *Cox* v. *Cox* (2),

(1) 6 Beav. 97. (2) 3 K. & J. 554.

Hubbard v. *Hubbard* (1), *Thackeray* v. *Parker* (2), and *Davis* v. *Turvey* (3). If this be so, the sale may be valid so far as regards the safety of the purchaser, but the rights of the parties interested in the property will not be affected: *Jermy* v. *Preston* (4); *Cooke* v. *Dealey* (5). The principle of the last-mentioned case was mentioned with approval in *Dyer* v. *Dyer* (6). The case of *Flanagan* v. *Flanagan*, cited in *Fletcher* v. *Ashburner* (7), and in the argument in *Ackroyd* v. *Smithson* (8), is not inconsistent with these cases, for there the testatrix contemplated a sale of her real estate, and expressly disposed of the surplus proceeds.

Mr. *Hemming*, for the Attorney-General, was not called upon.

SIR G. JESSEL, M.R.:—

This particular case does not raise all the questions which have been argued.

The facts are very simple. Two persons, one an infant, the other adult, are entitled in equity to real estate as tenants in common in tail, with cross remainders between them. A suit is instituted by trustees for administration of the trusts of the instrument under which these persons are entitled, and a decree is made in this form:—[His Honour read the decree.] Under that decree the estate is sold, and the purchase-money paid into Court; and by the order on further consideration one half of the fund in Court is paid to the adult, and the other half is carried over to the ordinary separate account of the infant; and under these circumstances the infant would have been absolutely entitled to that moiety if he had attained twenty-one. The infant, however, died under twenty-one; and thereupon this Petition is presented by the adult to have the money paid to him.

The Petitioner says that, notwithstanding the decree and order I have mentioned, the proceeds of sale must be treated as realty; that he, being originally tenant in tail in remainder, has barred his estate tail, and is now absolutely entitled to the fund. But

(1) 2 H. & M. 38.
(2) 1 N. R. 567.
(3) 32 Beav. 554.
(4) 13 Sim. 356.
(5) 22 Beav. 196.
(6) 34 Ibid. 504.
(7) 1 B. C. C. 498.
(8) Ibid. 503.

M. R. 1874 STEED v. PREECE.

the answer to that is simple: the estate has been sold and turned into money in a suit to which he, being an adult, was party, and that too, so far as the decree is concerned, by his consent. He cannot now be heard to say that that was wrong, first, because it was done by consent; and, secondly, because the decree stands unreversed, and therefore would be binding on him, even if he had not consented. The estate has, therefore, been properly converted into money, and as between volunteers—which both administrators and remaindermen are—it has been laid down that they must take the estate as they find it.

In *Oxenden* v. *Lord Compton* (1) Lord *Loughborough* says, speaking of the real and personal representatives: "Both are volunteers. Each must take what they find at the death of the person entitled for life, in the condition in which they find it. The legal right is not questioned: then upon what equity must I make this transmutation for the benefit of a person equally a volunteer?" That is the question I have asked here, and it has been suggested that the Court was wrong. It is said that the Court had power to sell for the purpose of raising costs, but for no other purpose. But if the Court had no power to sell generally, how could it sell for costs? An infant has no costs: the costs incurred on his behalf in a suit are the costs of his guardian or next friend; and even if they were his own, I know of no principle by virtue of which the debt of an infant can, apart from a judgment, be charged on his real estate. If, then, the suggestion be that the conversion is altogether wrongful, I am asked to reverse a decree of the Court, which I cannot do.

But then it was said that the decree of the Court was partially wrong. Now, as to that, the case of *Flanagan* v. *Flanagan* appears to me unanswerable:—[His Honour read the statement of this case contained in the judgment in *Fletcher* v. *Ashburner* (2).] I am aware that the decision of Vice-Chancellor *Shadwell* in *Jermy* v. *Preston* (3), and the decision of Lord *Romilly* in *Cooke* v. *Dealey* (4), appear at first sight to be antagonistic to this. In *Jermy* v. *Preston* the report does not state the trusts of the term the estate subject to which had been sold: but counsel on both

(1) 2 Ves. 69, 70.
(2) 1 B. C. C. 500.
(3) 13 Sim. 356.
(4) 22 Beav. 196.

sides appear to have said that the Court had sold more than was necessary. How that could be is difficult to understand, for it appears from the report that the decree ordered a sale or mortgage, with the Master's approbation, of a sufficient part of the estates comprised in the term, and that the Master made a report approving of the sale, by which he must have found that a sufficient part was sold. Again, the judgment in *Cooke* v. *Dealey* (1) is based on a general principle assumed to have been laid down in *Ackroyd* v. *Smithson* (2), viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd* v. *Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale. As I have already remarked, it is not necessary to decide that question now: but it seems to me that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold.

There will be a declaration that the fund is payable to the legal personal representative of the infant; but the Petitioner will have his costs out of the fund.

Solicitors: Mr. *Fortune;* Messrs. *Raven & Bradley.*

(1) 22 Beav. 196.

(2) 1 B. C. C. 503.

V.-C. M.
1874
March 11, 23.

THOMAS *v.* HOWELL.

[1872 T. 71.]

Will—Construction—Pure and Impure Personalty—Balance at Bankers—Set-off—Unpaid Rents—Charitable Bequests.

A testator having directed his debts and legacies (other than charitable legacies) to be paid out of impure personalty, and his charitable legacies out of pure personalty, the following points were decided:

The testator borrowed £6500 from his bankers, to be repaid on a specified day. He died before the day of payment, and at his death a sum of £629 was standing to his credit, on his current drawing account:—

Held, that the £629 must be treated as a set-off against the sum due on the loan account, and was not to be dealt with as an asset in the hands of the executors.

At the death of the testator a sum of £90 for rents collected, but not paid over, remained in the hands of his agent, and a larger sum was due to the agent for commission on rents collected:—

Held, that the £90 must be set-off against the larger sum due for commission, and was not to be treated as an asset of the testator.

There was also a sum of £861 due to the testator as arrears of rent from leaseholds, in respect of which ground-rent and other outgoings were payable:—

Held, that the arrears of rent due were not liable to reduction for ground-rent and outgoings, but must be treated as pure personalty.

There was a further sum of £2202, due for the apportionment of the quarter's rent of leasehold estates:—

Held, that this was pure personalty.

The will contained a bequest of £200 to each of ten poor clergymen of the Church of *England*, to be selected by his friend, *J. O.*:—

Held, that these were not charitable legacies, but were payable out of the testator's general estate.

Gift by will of legacies of £200 each to twenty charitable institutions, followed by a gift by a codicil as follows:—"Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4000 more to the established institutions of the country, making it together £8000:—

Held, that the gift was conditional on the income of the estate amounting to the specified sum, and that not being the case the gift failed.

Attorney-General v *Lloyd* (1) not followed.

THIS was a suit for the administration of the estate of *Thomas Howell*, under which a decree was made in June, 1872, and the

(1) 1 Ves. Sen. 32.

case now came on upon further consideration for the determination of various questions arising under *Thomas Howell's* will, which was dated the 21st of April, 1870.

The testator by his will appointed four persons executors, and, after giving many pecuniary legacies, to which it is unnecessary to refer, continued as follows:—

"I give to the treasurer for the time being of *St. Mark's Hospital, City Road*, the sum of £200 for the general use and benefit of the said hospital.

"And to the treasurer of the *Royal Literary Society* of *London*, for the use and benefit of such society, £50, and the receipts of the persons who shall be respectively treasurers of the said hospital and society at the time when the said legacies respectively shall be paid shall be a good discharge to my executors and trustees or trustee for the same.

"I also give to each of twenty charitable institutions, one of which shall be the *Royal National Life Boat Institution*, and the other nineteen institutions shall be such as my said trustees or trustee shall select, the sum of £200, and I declare that the receipt of the treasurer for the time being of each such institution shall be a good discharge for the legacy payable to or for the benefit of such institution.

"And I give to each of ten poor clergymen of the Church of *England*, whether holding benefices or not, to be selected by my friend *Joseph Butterworth Owen*, if alive, or, if dead, then by the acting executors or executor of my will, and in his or their judgment not holding High Church or Puseyite doctrines—£200."

Other charitable legacies were also given, and the will contained the following direction:—"I direct that all expenses and money necessary to be paid by my executors, or my trustees or trustee, and any legacies other than legacies to charities or for charitable purposes, shall be paid out of such part of my said estate as cannot legally be applied to charitable purposes, and that my legacies to charitable institutions, or for charitable purposes, shall be paid only out of such part of my estate as shall be legally applicable for such purposes."

The testator made a codicil to his will, dated the 29th of

V.-C. M. 1874 THOMAS v. HOWELL.

September, 1871, to which it is unnecessary to refer, and also a further codicil, dated the 18th of October, 1871, which began as follows:—

"Codicil to my will, made October 18th, 1871. Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4000 more to the established institutions of the country, making it together £8000."

The testator died on the 28th of February, 1872. The only real estate of the testator at the time of his decease consisted of two freehold cottages specifically devised by his will; but he was entitled to personal estate of very large amount, which was sworn under £140,000. The income of his whole estate, however, fell short of the sum of £16,000 referred to in his second codicil. By far the larger portion of his personal estate consisted of leasehold property, and it depended upon the construction of the above-mentioned clauses of the will and codicil whether the amount of his pure personal estate was sufficient to pay the charitable legacies in full.

Under these circumstances it became necessary to ascertain what portion of his estate came under the definition of pure personalty legally applicable to charitable legacies, and what portion of his legacies came under the legal definition of charitable legacies, and various questions were submitted to the Court by the certificate.

It appeared that on the 20th of December, 1871, a sum of £8000 was placed by the *London and Westminster Bank* to the credit of the testator's account by way of loan, such loan to be repaid by the testator on or before the 14th of March, 1872. This sum of £8000 was afterwards reduced by the testator, during his life, to £6500, which still remained due at his death on the 28th of February, 1872. At that period there was a sum of £629 12*s.* 2*d.* standing in the books of the said bank to the credit of the testator's current drawing account.

It was submitted to the judgment of the Court whether or not the said sum of £629 12*s.* 2*d.* was, under the circumstances, an asset come to the hands of the executors, or must be taken to

be and treated as a set-off by the bank in reduction of the £6500 due to them on the loan account.

Mr. *Glasse*, Q.C., and Mr. *North*, for the Plaintiffs, the trustees, stated the facts of the case.

Mr. *Cotton*, Q.C., and Mr. *Davey*, for some of the residuary legatees:—

We are interested in reducing the amount of pure personalty, and we contend that the sum due to the bankers was one specific sum of £6500, less £629 12*s.* 2*d.*, which, as a matter of course, would be set off against the larger sum due to the bankers. The drawing account would cease to be a separate account upon the testator's death, and it was only a matter of arrangement between the bankers and the testator that he continued drawing upon one account and allowed the other to remain till it was convenient to him to pay it off. The £629 12*s.* 2*d.* cannot, therefore, be considered as an asset of pure personalty; but the £6500, less the sum of £629 12*s.* 2*d.*, is all that the executors will have to pay out of impure personalty.

Mr. *J. Pearson*, Q.C., and Mr. *J. G. Wood*, for some of the charity legatees:—

Our contention is, that there could be no set-off by the bankers of this sum of £629 12*s.* 2*d.*, which was standing to the separate drawing account of the testator at his death. The £6500 was a loan by the bankers, to be repaid on a particular day. The money was not due till the 14th of March, 1872, consequently at the death of the testator, on the 28th of February, he was actually entitled to draw out the whole of the £629 12*s.* 2*d.* If the executors had proved and gone to the bank the day after the testator died, the bankers would have been bound to pay them that amount, and they could not set it off against what was not then due, and if an action had been brought by the executors against the bankers for the £629 12*s.* 2*d.*, the bankers could not have escaped payment by pleading a set-off of another sum which they had agreed not to demand until a subsequent period.

Although for convenience the executors might a fortnight

V.-C. M. 1874 THOMAS v. HOWELL.

afterwards have set off the £629 12*s.* 2*d.* against the £6500, and paid the bankers the difference, still it does not diminish the amount of assets which the executors were entitled to receive, and the cash at the bankers constituted the assets which formed part of the pure personalty of the testator made applicable by his will to the payment of his charitable donations.

Mr. *Vaughan Hawkins*, for other charity legatees.

Mr. *Robinson*, for one of the charities.

SIR R. MALINS, V.C.:—

The facts are simple: the testator, Mr. *Howell*, was a very wealthy man, but he happened, I suppose, to require a sum of money for a particular purpose, and he borrowed £8000 from his bankers, to be repaid on the 14th of March, 1872. That amount was placed to the credit of his loan account. He afterwards directed certain specific sums to be put to his loan account, and thereby reduced the amount of the loan to £6500; that sum then was due on the 14th of March, and he died on the 28th of February. I agree that when a banker makes an advance to a customer for a particular period he is bound to honour cheques upon the general drawing account of his customer to the last farthing of the amount standing to his credit, and consequently that as between Mr. *Howell* and his banker, Mr. *Howell* was entitled to draw out the whole of that £629, which belonged to his drawing account; but the question is, what did he owe to the banker at the time of his death? Under his will the debts and expenses are directed to be paid out of such part of his estate as could not legally be applied to charitable purposes, that is to say, out of his impure personalty, and the legacies to charitable institutions, or for charitable purposes, out of pure personalty. It is said, therefore, that when the executors went to pay the bankers the debt due to them they were bound to pay the £6500 in full, leaving the £629 12*s.* 2*d.* to be paid out to them by the bankers as an asset of the testator; but, in fact, if they had gone to the bankers and asked them what was owing to them, the bankers would have said, Mr. *Howell* owes us £6500, and we owe Mr.

Howell £629 12*s.* 2*d.*, and they would naturally have deducted one sum from the other, and would have handed over to the bankers the difference. I cannot come to any other conclusion but that the executors were bound to pay the debt after deducting one sum from the other, therefore the difference only should be paid out of impure personalty. The £629 12*s.* 2*d.* would not be an asset at all, and would not form part of the pure personalty.

At the death of the testator a sum of £90 17*s.* 1*d.* remained in the hands of his agent on account of rents collected for the testator, but not paid over. At the same time there was a much larger sum due to the agent for commission on rents collected by him. A question was raised whether or not this sum of £90 17*s.* 1*d.* was to be deemed an asset or must be treated as a set-off by the agent in part satisfaction of the larger sum due to him on account of unpaid commission on rents collected for the testator in his lifetime.

Mr. *Glasse*, Q.C., and Mr. *North*, submitted this question to the judgment of the Court, and cited *Edwards* v. *Hall* (1).

The VICE-CHANCELLOR decided that this sum of £90 17*s.* 1*d.* must be set off against the larger sum due to the agent for commission, and, consequently, that it did not form part of the pure personal estate of the testator.

At the testator's death there was a sum of £861 19*s.* due to him as arrears of rent.

A question was raised whether this sum should contribute a proportion of the ground rent and other outgoings in respect of the property from which the same arose.

The VICE-CHANCELLOR said the £861 19*s.* was in the nature of fruit fallen, and was part of the pure personal estate. The debts due for rent could not be subject to contribute to the payment of ground rent and other outgoings.

(1) 6 D. M. & G. 74.

V.-C. M. 1874 THOMAS v. HOWELL.

There was also a sum of £2202 17*s.* 6*d.*, being the apportioned amount of the quarter's rent of the testator's leasehold estates due at Lady Day, 1872, up to the 28th day of February, 1872, the day of the testator's death.

The question submitted to the Court was whether the sum so apportioned was to be considered as pure personalty, or whether it was an asset connected with land.

The VICE-CHANCELLOR was of opinion that the apportioned amount of the quarter's rent due up to the testator's death was pure personalty.

The next question raised was whether the legacies of £200 each to the ten poor clergymen were charitable, and therefore liable to abate, or were personal, and consequently payable in full.

Mr. *Glasse*, Q.C., and Mr. *North*, for the Plaintiff:—

We say that these gifts to ten poor clergymen are in the nature of charitable legacies, and therefore only payable out of pure personalty; and that if the portion of the estate applicable to such purposes will not pay the charitable legacies in full, these gifts must abate with the rest.

This is a similar case to that of *Nash* v. *Morley* (1), where "the gift was to be divided among poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families of good character." That was held to be a valid charitable bequest, the word "poor" extending through the whole sentence. We say the motive of the gift is poverty. In *Attorney-General* v. *Baxter* (2), and, on appeal, *Attorney-General* v. *Hughes* (3), it was decided that a devise of moneys to be distributed amongst pious ejected Nonconformist ministers was a good charitable bequest, and the money was ordered to be paid out to *Baxter*, to be distributed according to the will.

Mr. *Cotton*, Q.C., and Mr. *Davey*, in the same interest, for residuary legatees:—

Relief of poverty is charitable, and this is consequently a

(1) 5 Beav. 177. (2) 1 Vern. 248. (3) 2 Vern. 105.

charitable bequest. It was so held in *Russell* v. *Kellett* (1). In that case there were several gifts of the same nature as this, such as "To poor widows or creditable industrious unmarried women upwards of forty years of age;" again, "to poor creditable industrious persons in a particular town with two children or upwards, or above fifty years of age, maimed or otherwise, unable to gain a living;" and lastly, "to the poor of *Ulverstone* £50, to be paid among them as the trustees shall think proper." All these were charitable gifts. *Attorney-General* v. *Price* (2), and *Isaac* v. *Defriez* (3), were cases of a similar kind.

Mr. *Higgins*, Q.C., and Mr. *E. A. Owen*, for the representatives of a deceased residuary legatee:—

Whether this is looked at on principle, or in view of the *Statute of Elizabeth* (43 Eliz. c. 4), or on authority, this is a charitable bequest. The cases collected in *Tudor's* Leading Cases (4) all go to this.

Mr. *V. Hawkins*, for some of the charitable legatees:—

Our argument is that the question whether this is a charitable bequest or not arises in a distinct way from the cases cited.

There is no case in which the question now raised has been decided, except the case of *Brunsden* v. *Woolredge* (5), where there was a gift of personalty savouring of realty which was ordered to be distributed among the poor relations of the testator's mother, which was construed to mean relations who were poor and objects of charity, shewing that the gift was not a charitable bequest within the *Statute of Mortmain*. The statute (9 Geo. 2, c. 36) was passed in 1736, and the decree was made in 1766. The date of the will does not appear from the report.

There are, however, two questions—whether a gift is charitable, so as to be exempt from the rule against perpetuities, and another whether it is within the *Statute of Mortmain*. That a gift to poor relations is not within the statute, is decided by *Brunsden* v. *Woolredge*.

(1) 3 Sm. & Giff. 264. (3) 17 Ves. 373, n.
(2) 17 Ves. 371. (4) 2nd Ed. p. 49.
(5) Amb. 507.

V.-C. M. 1874 THOMAS v. HOWELL.

Suppose you have a gift of this sort—a testator giving directions to distribute money from time to time, or for ever, among poor persons of a particular sort—there the Court will look to see whether it is to have a perpetual continuance; if it is, then the gift is void, but if it is only to distribute a sum immediately, it is not a charity at all; it is a mode of ascertaining who are the individuals who are to receive the gift. These gifts to poor persons are only as a distinguishing mark to find the persons. *Brunsden* v. *Woolredge* (1) was a case of that nature. The case of *Attorney-General* v. *Price* (2) is in our favour, for there it was a perpetual charity, and in *Gillam* v. *Taylor* (3) the point was that the charity was to have perpetual existence. It was so also in *Nash* v. *Morley* (4), and in *White* v. *White* (5).

Mr. *Robinson*, in the same interest, cited *Liley* v. *Hey* (6), where it was held that a devise in trust to distribute the rents and profits annually amongst certain families according to their circumstances as in the opinion of the trustees most needed assistance, was not void, as tending to create a perpetuity, and not void within the *Statute of Mortmain*.

Mr. *Holland*, for two of the clergymen who had been selected:—

This is a precisely similar case to that of *Attorney-General* v. *Baxter* (7). In fact, that case is much stronger that this; there it was held to be a charity in the Court below, but the decree was discharged on appeal, as reported (8); and in *Moggridge* v. *Thackwell* (9), we see from Lord *Hardwicke's* notes why it was discharged. He says, referring to *Attorney-General* v. *Baxter*, "It was not upon anything contradicting the general principle, but because it was a legacy to sixty particular ejected ministers to be named by *Baxter*, and as if a legacy to those sixty individuals."

There is no case deciding simply that a gift to a number of poor persons, to be selected by a particular individual, is a charity. It

(1) Amb. 507.
(2) 17 Ves. 371.
(3) Law Rep. 16 Eq. 581.
(4) 5 Beav. 177.
(5) 7 Ves. 423.
(6) 1 Hare, 580.
(7) 1 Vern. 248.
(8) 2 Ibid. 105.
(9) 7 Ves. 36.

is the same as if he had selected and named the ten persons himself.

Mr. *Hemming*, for the Attorney-General.

Mr. *Alexander*, for one of the poor clergymen.

Mr. *Cotton*, in reply:—

Where a legacy is given to persons not known to the testator, but distributable on account of their poverty, that is a charitable gift.

The effect of the word "poor" is to cut the bequest down to a charity. A gift to the school for the sons of poor clergy would be a charity. Wherever the gift is for the benefit of the poor, it is a charity. That is the effect of the decision in *Russell* v. *Kellett* (1), and also in *Mahon* v. *Savage* (2), and *Thompson* v. *Corby* (3).

A charitable gift is not the less charitable because the payment is to be immediate. Whether it is charitable or not depends upon the objects, and not at all on whether, if not charitable, it would be a perpetuity. If the objects are so far charitable as to oust any objection on the ground of perpetuity if the gift had been perpetual, they must equally be charitable within the meaning of the Act of Geo. 2. The cases cited shew that a gift to such objects is charitable for the former purpose, and it must, therefore, for all purposes be regarded as charitable.

SIR R. MALINS, V.C.:—

The only question is, whether this legacy is a charity which would come within the meaning of the Act of 9 Geo. 2, c. 36. It appears that there is abundance of property to pay all the legacies, but the pure personalty is not sufficient to pay the charitable legacies. If therefore the case comes within that statute, then these legacies must be paid out of that portion of the estate which is pure personalty, and the charity legacies will have to abate.

Now is this legacy within the meaning of that statute? The testator gives "to each of ten poor clergymen of the Church of

(1) 3 Sm. & Giff. 264. (2) 1 Sch. & Lef. 111.
(3) 27 Beav. 649.

V.-C. M. 1874 THOMAS v. HOWELL.

England, whether holding benefices or not, to be selected by my friend *Joseph Butterworth Owen*, if alive, or if dead, then by the acting executors or executor of my will, and in his or their judgment not holding High Church or Puseyite doctrines, £200." In other words, it is a gift to ten clergymen, because they being poor require it. There is no doubt that his object was to confer a benefit on those that required it, and they were to be selected by Mr. *Owen*. In one meaning of the word, that is certainly a charity, and so in a certain sense wherever a legacy is given it is a charity; but it would be carrying the doctrine of the Court a long way to say, that because a legatee is to have a gift on account of his being a poor man, that therefore it is a charitable bequest within the meaning of the *Mortmain Act*. It would be a monstrous injustice to hold this when the very object of requiring assistance is the fact of a man being poor. In every case it depends on whether there is a charity, which is to continue for a certain specified time, as in the case of *Nash* v. *Morley* (1), where you have not only old and infirm individuals and people with large and sick families, but they are to sustain a particular character at a particular time. Here I am asked to treat the bequest as if poverty were the principal ground of the gift. Nothing is more opposed to the meaning, in my opinion. It is said that because the legacies are given to them as poor men, that therefore they cannot have it unless there is enough of pure personalty to satisfy the charitable legacies. Suppose the testator had said, "I give to *A.*, *B.*, and *C.*, who are poor clergymen," that would not be a charitable legacy, but in giving to ten poor clergymen, who are quite as good, and of the same class of clergymen as those who are not poor, it is said that is a charity. It appears to me to be just the same as if they had been named, and I do not see on principle that it makes any difference, or why they should not have it, because they happen to be poor.

This is my opinion on principle; but how does it stand on authority? There are several cases in favour of my view of this question. There is *Attorney-General* v. *Baxter* (2), reported on appeal as *Attorney-General* v. *Hughes* (3), where there was a devise of moneys to be distributed among poor ejected nonconformist

(1) 5 Beav. 177. (2) 1 Vern. 248. (3) 2 Vern. 105.

ministers; it was there ordered to be paid out to *Baxter*, to be by him distributed according to the will, thus reversing the decision of the Court below. The motive was, no doubt, charity, but it was held not to be a charitable gift. It has been contended in this case that because the motive is charity, therefore it is a charitable gift within the statute; but I dissent from that argument. It is not a charitable bequest, unless it is a gift for the maintenance of a charity. It has been suggested that in *Brunsden* v. *Woolredge* (1), the will was made before the *Statute of Mortmain*, but it seems that the decree was made in 1765, and the statute was passed in 1736. There the bequest was to his mother's poor relations, and that was construed to mean "relations who are poor and objects of charity," and the money was ordered to be distributed among such of the poor relations of the mother as *Woolridge* should think fit. If the gift among poor relations had made it a charity within the *Mortmain Act*, it would have been altogether void. The Master of the Rolls there says, "At first I thought the estates called *Ryders* and *Franklins* had been given to be a continuing perpetual fund for the poor relations for ever, as was the case of a particular fund in *Isaac* v. *Defriez* (2), but I am satisfied those estates as well as the rest are to be sold."

I can find no case which has ever been decided in opposition to this view, and therefore, on principle as well as upon authority, I decide that these are general legacies and must be paid out of the general estate of the testator.

March 23. A question was now raised as to the meaning and effect of the second codicil.

Mr. *J. Pearson*, Q.C., and Mr. *Wood*, for one of the nineteen institutions which had been selected by the executors as recipients of the legacies of £200 given by the will:—

The introductory statement in the codicil does not import a condition. It is a mere statement of fact of the testator's belief as to the extent of his estate, and the fact of the statement being erroneous does not make the gift invalid. In order to make the

(1) Amb. 507. (2) 17 Ves. 373, n.

V.-C. M. 1874 THOM'S v. HOWELL.

gift conditional there must be some words importing that if the calculations are incorrect the gift is to fail: *In the Goods of Dobson* (1); *In the Goods of Martin* (2).

The distinction is between a statement of a fact which turns out to be untrue, as a ground for giving or revoking a legacy, as in *Campbell* v. *French* (3), and a mere statement of believing or having been advised as to a fact, and the belief or advice turning out to be erroneous, as in *Attorney-General* v. *Lloyd* (4); *Jarman* on Wills (5).

Mr. *Robinson*, for other charities:—

The distinction between the statement of a fact and of belief or advice as to a fact, is too well decided to be disturbed: *Gordon* v *Gordon* (6).

Mr. *A. C. Humphreys*, for another charity.

Mr. *Hemming*, for the Attorney-General:—

The pure personalty being insufficient for payment in full of the charitable legacies given by the will, the question is only one as between one charity and another. But the point is of importance as involving a principle which may be applicable in other cases, and the rule which has been laid down in *Attorney-General* v. *Lloyd* ought to be maintained.

Mr. *Bovill*, Q.C., appeared for a legatee under the second codicil.

SIR R. MALINS, V.C., without calling upon any other parties:—

I entertain a clear opinion as to the proper construction of this codicil. The testator has given by his will a number of legacies, and amongst them a fund to be divided between the *Royal National Life Boat Institution* and nineteen other charities to be selected by his executors, and he gives a general direction for marshalling his estate between the charitable and personal

(1) Law Rep. 1 P. & D. 88.
(2) Ibid. 380.
(3) 3 Ves. 321.
(4) 1 Ves. Sen. 32.
(5) 3rd Ed. p. 170.
(6) 1 Mer. 141.

legacies, and then having given as much to charities as he thought his estate would stand, he proceeds to divide the residue.

Subsequently contemplating his estate as being of a certain amount, and thinking that in that view he ought to increase the amount of his charitable legacies, he gives an additional sum of £4000 "to the established institutions of the country," by which expression he meant those institutions to which he had before referred.

Why does he give the £4000 more? Because, as he says, he believes the rental of his estate will produce £16,000 to £18,000 a year. It is argued that even if the estate is less than that amount, the legacy ought still to be given, and that the question is concluded by authority. In my opinion, the present case is not within any of those which have been cited; because in the cases cited the erroneous belief or advice was as to the existence or capacity of the legatee. But it is quite a different thing where the erroneous belief is as to the extent of the testator's property. If a testator said he thought he had £100,000, and distributed his estate accordingly, and it turned out that he only had £20,000, his intention would clearly be defeated by disregarding the preliminary statement.

The rule is to find out what the testator means, and give effect to his intention. Now what does the testator mean here? When he says that, presuming and believing a certain state of things, he gives an additional sum of £4000, on what principle can I say that his belief did not influence him in making this gift, and how can I double the legacies, when in fact the supposed state of things was an entire mistake?

It is said that the question is concluded by authority. But in my opinion not one of the cases cited touches the present case, though the case of *Campbell* v. *French* (1) is somewhat analogous. The testator there by a codicil revoked some legacies, giving his opinion that the legatees were all dead, and the fact turned out the other way, and it was held that the revocation did not take effect.

With regard to *Attorney-General* v. *Lloyd* (2), it was a very peculiar case, and I am of opinion that if the question had turned

(1) 3 Ves. 321. (2) 1 Ves. Sen. 32.

V.-C. M. 1874 THOMAS v. HOWELL.

on the construction of the first codicil, the decision would have been the other way. It is perfectly clear that the reason on which the gift was made having failed, the conditional gift would not be good. Then came the second codicil, by which the testator made an absolute gift of the realty to one person, and an absolute gift of the personalty to the charity to which he had previously given the whole, stating as a reason for the alteration in disposition, his having been advised that a gift of the realty would have been void under the Statute of Mortmain. This was a mistake, because the will was made before the Act of 9 Geo. 2, but the codicil was upheld. That does not reach this case, because here there is no complete alternative gift.

I think, however, that if *Attorney-General* v. *Lloyd* (1) had to be decided now, the decision would be the other way.

The result is that the additional gift of the £4000 fails altogether.

Solicitors: Messrs. *Bower & Cotton;* Messrs. *Merriman & Pike;* Messrs. *Ouvry, Farrer, & Co.;* Messrs. *Raven & Bradley;* Messrs. *Cookson, Wainewright, & Pennington;* Messrs. *Whitakers & Woolbert;* Mr. *H. T. Boodle;* Messrs. *Norris, Allens, & Carter.*

(1) 1 Ves. Sen. 32.

In re CLINE'S ESTATE.

V.-C. M.
1874
April 17.

Apportionment Act, 1870 (33 & 34 *Vict. c.* 35)—*Instrument coming into operation before the passing of the Act—Life Interest in Fund representing Real Estate.*

The *Apportionment Act*, 1870, applies to all instruments, whether coming into operation before or not till after the passing of the Act.

Dividends on a fund in Court representing real estate of a testator who died in 1827, *held* apportionable as between successive tenants for life.

THIS was a Petition for the payment of the dividends on certain funds in Court.

These funds had been paid into Court by the *Great Northern Railway Company* as the purchase-money of certain portions taken by them of an estate which, with other property, was devised by the will of *Henry Cline*, dated the 9th of September, 1826, to trustees, upon trust to permit the rents and profits to be received by his wife *Margaret Cline* during her life, and after her death by his daughters *Frances Ann Bacon* and *Amelia Cline* during their joint lives, and after the death of either of them, by the survivor for her life, and after the death of the survivor, by four grandchildren, whom he named therein, and after the death of any one or more of them, by the survivors and survivor of them for their respective lives.

The testator died on the 2nd of January, 1827, and his widow, *Margaret Cline*, died on the 4th of March, 1841.

Amelia Cline married *Thomas Smith Barwell*, and having survived the testator's other daughter, died on the 27th of October, 1873. At the time of her death there was only one grandchild of the testator living, namely, *Anne* Countess *di Cigala*.

During the lifetime of Mrs. *Barwell* the dividends had been paid to her, but the January dividends, which had been received since her death, were now in Court.

A question had been raised as to whether the *Apportionment Act*, 1870, applied to these dividends, and the Petition asked that the order for the distribution of the January dividends might be prefaced by a declaration of the opinion of the Court on the

V.-C. M. 1874

In re CLINE'S ESTATE.

question of apportionment. The present trustees of the will of the testator were also Petitioners.

Mr. *W. Latham*, for the Petitioners:—

The question is whether the *Apportionment Act*, 1870, is so far retrospective as to apply to the case not only of an instrument executed before the passing of the Act, but of one coming into operation before that time. *Capron* v. *Capron* (1) applied it to the case of an instrument dated before the Act but coming into operation afterwards. The question was touched upon, but not decided, in *Jones* v. *Ogle* (2).

The operation of the previous Act could only be excluded by express words: *Tyrrell* v. *Clark* (3).

SIR R. MALINS, V.C.:—

In my opinion this is a general enactment making all dividends apportionable, and I think that if it had been intended to restrict its application to instruments dated or coming into operation after the passing of the Act, it would have been so stated. In my opinion it applies to all cases, whether the instrument under which the question arises came into operation before or not till after the passing of the Act.

Solicitors: Messrs. *Wordsworth, Blake, Harris, & Parson.*

(1) Law Rep. 17 Eq. 288. (2) Law Rep. 8 Ch. 192.
(3) 2 Drew. 86.

HEATH *v.* CREALOCK.

V.-C. B.

1873

April 25, 26, 29; *Nov* 21, 22, 24, 25; *Dec.* 10.

[1870 H. 248.]

Trustee and Cestui que Trust—Breach of Trust—Mortgage—Priority—Estoppel—Purchase for Value without Notice—Delivery up of Title Deeds—Secondary Evidence.

In 1856, *A.* and *B.*, being trustees of £7000, invested it on mortgage of freeholds, of which *C.* was owner. The mortgage was negotiated by *B.*, who was a solicitor, and had for some time been engaged in various transactions with *C.* and acted for him professionally. The business arrangements of the trust, including payment of the income to the *cestui que trust*, were carried on by *B.*, no active part being taken by *A.*, who was a clergyman, and frequently absent abroad for his health. In 1859, *C.*, with the knowledge and authorization of *B.*, but without the knowledge of *A.*, sold a portion of the mortgaged property to *D.* Upon this sale all notice of the mortgage was suppressed. The title deeds were handed to *D.*, and the purchase-money, £3000, was received by *B.*, who gave *C.* a receipt "for self and co-trustee," promising to obtain *A.'s* execution of a reconveyance on his return to *England*. In 1870 *C.* contracted to sell a further portion of the property to *E.*, and in the course of the transaction, on pressing for a reconveyance, was informed by *B.* that he had misappropriated the £3000. Upon the representation that *C.* had succeeded in selling portions of the mortgaged properties for £4500, *A.*, who was wholly ignorant of the real state of the case, was induced by *B.* to execute—1, a conveyance by direction of *C.* to *E.*, as purchaser for £1500; and, 2, a reconveyance to *C.*, in consideration of an alleged payment of £3000, of the portions already sold to *D.* (to enable *C.*, as it appeared, to convey this portion separately to a purchaser).

Upon receiving the reconveyance, *C.* executed the conveyance and completed the sale to *E.*, and the purchase-money (£1500) was handed over to *B.*, who shortly afterwards absconded with the mortgage-deed in his possession:—

I. *Held*, (*a*), that *A.* was entitled to have the reconveyance of 1870 cancelled as obtained by fraud; and, (*b*), that the estate supposed to have been acquired by *C.* under such reconveyance having been destroyed, there had been no subsequent acquisition of title by *C.* so as to perfect against *A.*, by estoppel, the defective title which *D.* acquired under his purchase from *C.* in 1859.

II. *Held*, also (following *Colyer* v. *Finch* (1)), that the relief sought against *D.* being to compel him to redeem *A.'s* prior mortgage, or in default to stand foreclosed, the doctrine that the Court will not interfere as against purchasers for value without notice, did not apply; and that upon the failure of *D.* to

(1) 5 H. L. C. 905.

V.-C. B.
1873
HEATH
v.
CREALOCK.

redeem, *A.* was entitled to realise his security (except as to the part sold to *E.* against whom the bill was dismissed) by a sale, and to have the title deeds in the possession of *D.* delivered up.

Secondary evidence of the mortgage deed of 1856 under the circumstances admitted.

Affirmed by C.A. 1 J. & H. 10 Ch. 22

IN March, 1856, the Plaintiff, the Rev. *Charles Harbord Heath*, and the Defendant, *William Swain Crealock*, were appointed the trustees of certain funds, which they held subject to the trusts of a deed dated the 24th of February, 1816. Of these funds £2096 11*s.* 9*d.* had been divided amongst the persons beneficially interested, and £7700 was advanced to the Defendant *Stephens* upon the security of a mortgage in fee simple, dated the 24th of November, 1856, of property in *Wales*, of which *Stephens* was the owner; the mortgage being accompanied by a delivery of the title deeds to Plaintiff and *Crealock* as mortgagees. The Defendant *Crealock* was at that time in practice as a solicitor at *Aberystwith*, of good repute, and in considerable practice, and being solicitor in the affairs of the trust, as well as one of the two trustees, he undertook the negotiation of the mortgage, the examination of the title, and the preparation of the security.

The Defendant *Stephens* had also been in practice as a solicitor, and before the date of the mortgage there had been between himself and *Crealock* various pecuniary and other transactions which were afterwards continued. In respect of these dealings an account current was established between them; various sums of money having been received by *Crealock* on account of *Stephens*, and payments made to and on his behalf, and the mortgage money, £7700, was carried into this account, and formed an item to the credit of *Stephens*. *Crealock* was also employed by *Stephens* professionally, and during the period over which the account extended he also acted as his banker.

The amounts which from time to time became due in respect of the interest on the mortgage debt were carried in the account to the debit of *Stephens*, and were paid by *Crealock* on *Stephens'* behalf to Major *Bowen*, who was entitled as tenant for life to that interest. Early in 1859, *Stephens*, intending, as he stated, to pay off the mortgage debt, advertised the mortgaged hereditaments, with other property belonging to him, for sale. This intended public sale

was abortive; but *Stephens* subsequently (in February, 1859) sold by private contract three several portions of the property comprised in the mortgage to the Defendants, *Lewis*, *Beavan*, and *Pugh*, for sums amounting in the aggregate to £3080.

When the time for completing the sales approached, *Crealock*, who acted as solicitor for *Stephens* in the matter, informed him that as the Plaintiff was somewhere abroad great delay would be occasioned by getting him to join in the conveyances to the purchasers, or in a reconveyance to *Stephens*. Accordingly *Stephens*, as he stated, believing these statements to be true, and it being important to avoid any delay, agreed with *Crealock* that the sales should be completed without disclosing the existence of the mortgage, and that he (*Stephens*) should execute simple conveyances to the purchasers as if he were entitled in fee simple free from incumbrances, and that he would not take a reconveyance from the Plaintiff and *Crealock* until the whole of the mortgage debt was paid off. The usual inquiries were made on behalf of the purchasers as to the existence of any incumbrances affecting the property contracted to be sold, and the reply returned by *Crealock* as solicitor, and on behalf of *Stephens*, was, "Not that I am aware of."

The title deeds, which had remained in the possession of *Crealock*, as solicitor to the trustees, were by him given up to *Stephens*, who was thereby enabled to deduce an ostensibly good title, free from incumbrances, to the several portions so sold; and upon the completion *Stephens* delivered such title deeds to the purchasers, in whose possession they still were.

The purchase-money, £3080, was paid to *Crealock*, who gave *Stephens* a receipt in the following form:—

"*London*, 23rd February, 1859.

"Received of *T. K. Stephens* the sum of £3080, on account of and in part discharge of the principal-money of £7700, due to us on mortgage of Mr. *Stephens*' estate, and we undertake on payment of the balance to release and reconvey the parts thereof called (naming them), when required by Mr. *Stephens*, his heirs, executors, administrators and assigns, free from all mesne incumbrances.

"For self and co-trustee,

"*Wm. Swain Crealock*."

V.-C. B. 1873 HEATH v. CREALOCK.

Stephens, after the 23rd of February, 1859, paid *Crealock* interest on the balance only of the mortgage debt (£4620) until 1870, while *Crealock*, who had received and appropriated to his own purposes the £3080, continued to pay Major *Bowen* (the *cestui que trust*) the full amount of interest on the £7700. Under these circumstances the Plaintiff, who was for a considerable period absent abroad, had no knowledge whatever, or suspicion, of what had taken place, and until the absconding of *Crealock* in September, 1870, had neither knowledge nor notice of any circumstance leading him to believe or suspect that the mortgage security had been in any degree imperilled or affected.

Stephens, as he stated by his answer, continued to pay interest upon the £4620, without the slightest thought or suspicion that the Plaintiff had not been informed that £3080 of the mortgage debt had been paid off, or that the money had not been reinvested by *Crealock* in the joint names of Plaintiff and himself.

In November, 1864, *Stephens*, in writing to ask *Crealock* whether he and his co-trustee would have any objection "to take up the principal and interest to the next half-yearly day of payment" (24th of May, 1865), for the first time made inquiry if the amount paid off had been indorsed upon the mortgage deed. *Crealock* wrote back that speaking from memory he believed the memorandum referred to by *Stephens* was at the time indorsed on the mortgage deed, and that unless *Stephens* had any very particular object in their receiving the money next May, neither Major *Bowen* nor *Heath* would wish the security to be changed if it could be helped.

In 1865 a small portion of the property comprised in the mortgage, was taken by the *Central Wales Railway Company*, for which they agreed to give £10 compensation. On this occasion *Stephens* suggested in a letter to *Crealock* the propriety of preparing a reconveyance of the property on which the mortgage money had been paid off and sending it to Plaintiff for execution. *Crealock* took no notice of the suggestion, and the matter was allowed to drop. The matter was again referred to by *Stephens* in the summer of 1867, and *Crealock* promised to obtain the reconveyance when Plaintiff came back to *England;* but, according to *Stephens'* statement, not receiving any intimation of the return of the Plaintiff to *England*,

and not thinking that there was any danger or impropriety in not obtaining the reconveyance, "I (*Stephens*) did not prepare the draft of it, but allowed the subject again to drop."

In December 1869, *Stephens* agreed to sell to *William Price* for £1500 another portion of the property comprised in the mortgage. Though, as he admitted in his answer, he would have been glad if the facts of the mortgage to Plaintiff and *Crealock* could have been still suppressed, as it had been on the occasion of the purchases in 1858–9, he was afraid that he might incur some risk under 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8 (providing that any vendor or mortgagor concealing from the purchaser or mortgagee any settlement, deed, will, or instrument material to the title, or any incumbrance, should be deemed guilty of a misdemeanour, and punishable accordingly), if he again suppressed the fact of the mortgage; and accordingly he wrote to *Crealock* pressing him to obtain the execution of a reconveyance by *Heath*, and the signature of a receipt acknowledging the receipt not only of the £1500, the price of the portion contracted to be sold to *Price*, but of the £3080 previously paid by *Stephens*.

On the 4th of March, *Crealock* wrote:—"You will remember when you wished to sell the former farms that I explained to you that I should have to reinvest the money until such time as you would be paying off the balance of the mortgage, as I could not arrange to sever the amount. I have on the present occasion had great difficulty in getting the parties' consent to receive this £1500 now on account without the residue, and, indeed, it is only on the understanding that the balance of the mortgage shall be all paid up by the 1st of next August that they agree to reconvey this portion now; I have, therefore, to carry out this understanding so far, called in £3080 received from you and reinvested by me, and this will be ready to be paid over to the parties interested by the middle of July, at which time those farms which were sold for the amount had better be reconveyed by myself and *Heath* to you, and in the meantime it will be necessary for you to make arrangements for getting the balance together, either by transfer or new mortgage, or a sale of portion of the remaining property. There will be £3120 to make up, and I should think you might easily be able to sell the two *Radnorshire* farms for sufficient to cover that

V.-C. B. 1873 HEATH v. CREALOCK.

amount. I have pushed this off as long as I possibly could, but during the last few weeks I have had great difficulty in getting the *cestuis que trust* to listen to any further delay in having the mortgage realised. I have told them that you have, to comply with their wishes, contracted for the sale of other properties comprised in the security, at the values stated in the valuation thereof, amounting to £3080, which will be certainly paid to them before the 1st of next August, and that you will use every endeavour to provide the balance in the meantime, if they will let the matter stand over until then. It won't do, therefore, for me now to send the form of receipt you propose for *Heath's* signature, and for same reason it was I varied the form of recital in the conveyance. At present nothing appears in this transaction to shew that the mortgage to us does include the farms previously sold, as these did not appear in the abstract to *Bird's* farm; and if it should not be called for before completion, nothing would have been mentioned on the subject. I will make out and send you my charges in the matter as desired. You will of course arrange for the sum of £1500 being paid over to us clear, as that is the sum I have named to the *cestuis que trust*." And again, on the 2nd of August, 1870. *Crealock* wrote to *Stephens*:—"The *cestuis que trust* have not, as yet, received either the £3080 or the £1500—and if you carry out your present intention of not sending me the conveyance to get executed to you, I don't see how they are likely to get either of them."

About the time when the tenant for life died (1866), on the Plaintiff's refusing any further extension of time, *Crealock* had represented to him that *Stephens* was desirous of selling the properties comprised in the mortgage security, and of doing so to advantage, by putting up the property from time to time for sale in portions; and in this year (1870) *Crealock* represented to the Plaintiff that *Stephens* had succeeded in selling a part of the mortgaged property for £3080, and another part for £1500, and that he was desirous of having reconveyed to himself the several portions so sold upon payment of the several sums in part discharge of the mortgage debt. Two deeds were accordingly prepared for the purpose of effecting this object, and were sent by the Plaintiff's then solicitors, Messrs. *Budd & Son*, to the Plaintiff

for execution by him, one being a conveyance by the direction of *Stephens* to a purchaser (*Price*) for £1500; the other being a reconveyance to *Stephens* in consideration of £3080 alleged to be paid by him in respect of several small properties comprised in the mortgage deed, to enable him, as it appeared, to convey them separately to a purchaser or purchasers. The Plaintiff executed these deeds and sent them to *Crealock* on or before the 22nd of August, 1870. Messrs. *Budd*, Plaintiff's solicitors, on the 23rd of August, 1870, wrote to *Crealock* suggesting that the moneys, the consideration for these reconveyances, should be paid into a joint account, in the names of Plaintiff and *Crealock*, until they could be distributed among the *cestuis que trust* interested in them. The money not having been paid as had been expected, the Plaintiff's solicitors pressed *Crealock* to complete the matter, and threatened a journey to *Aberystwith*, to attend on behalf of the Plaintiff the completion of the sales, and see to the appropriation of the money. *Crealock* continued to make various excuses for the delay, and expressed his willingness that the purchase-moneys, as soon as received, should be paid into a deposit account in the names of Plaintiff and himself, until the distribution was effected, or that Messrs. *Budd* should attend the completion of the purchases. In the meantime *Stephens*, having been informed by *Crealock* that the Plaintiff had executed the conveyance and reconveyance, wished, according to his answer, "to satisfy myself by other evidence than *Crealock's* statement that the Plaintiff's signatures to those deeds were genuine," and on the 27th of August sent his son to see the Plaintiff at *Bucknall*, in *Staffordshire*, and inquire of him if he had signed the deeds. The Plaintiff, who was unable to understand the object of this inquiry, told the son that he had executed the deeds and forwarded them to *Crealock*. No further inquiry was made of the Plaintiff by *Stephen's* son, and it did not appear that he had been instructed to do so. On the same day *Stephens* wrote to *Crealock*, demanding the delivery to him of the reconveyance. *Crealock* replied that the reconveyance would not leave his possession until the accounts between them were settled. On the 29th of August *Stephens* threatened *Crealock* that he would write to Mr. *Heath*, "to explain the cause of this delay, and this will naturally lead to my going into all the parti-

V.-C. B. 1873 HEATH v. CREALOCK.

culars attending the case." *Crealock* replied, "If you do, it will simply end in this—that instead of my being able to hand you the deed, or the *cestuis que trust* the money, I must return Mr. *Heath* the deed and call my creditors together, and you must take your chance with the rest."

Stephens thereupon sent his son down to *Aberystwith* to get the reconveyance from *Crealock*. Young *Stephens* saw *Crealock* on the 2nd of September. During this interview *Crealock* explained his position, and that he had lost in speculations the £3080 paid by *Stephens* in 1859, and a good deal more, including a sum of £700 owing to *Stephens*. Young *Stephens* said he would not allow *Price's* purchase to be completed until his father got the reconveyance. Ultimately, however, young *Stephens* agreed, on his father's behalf, not to attempt to enforce payment of the debt of £700, for which a fresh promissory note was given, except in certain contingencies, and to allow *Crealock* £100, such sum being intended to cover every claim for costs relating to anything done or thereafter to be done by *Crealock* in connection with any of *Stephens'* property in mortgage to Major *Bowen's* trustees or otherwise. The reconveyance was then handed over to young *Stephens* by *Crealock*, and *Price*, who was waiting outside, was called in and completed his purchase, paying his purchase-money (£1500) to *Crealock*, who handed him his conveyance (already executed by *Stephens*) and some title deeds. The 21st of September was appointed by *Crealock* as the day on which he would attend in *London* to complete the transaction. The Plaintiff came up to *London* to meet him, but *Crealock* did not keep his appointment. On the same day however, a Mr. *Tweed*, as the agent of *Crealock*, called on Messrs. *Budd* and told them that he had absconded, handing them the following written statement:—

"In February, 1859, Mr. *Stephens* applied to sell a portion of his property, and a part was sold for £3080. The vendor was Mr. *Stephens* alone, but the money was received by Mr. *Crealock*, and invested by him in his own name on various securities, and ultimately lost. The interest was regularly paid by Mr. *Crealock*. The second sale was completed 2nd September, and the purchase-money (£1500) was received by Mr. *Crealock*. Mr. *Crealock's* proposal is to give Mr. *Heath* a bond for £4900, the amount due

by him to the trust estate, and to pay interest thereon at the rate of 4 per cent. per annum, and to hand over a policy in the *Economic Insurance Company* for £6000 as a collateral security, and to hand over all the deeds in his possession relating to the estate, and to be released. The security for the £3100 still due is by Mr. *Stephens* stated to be ample."

On the 22nd of September *Crealock*, from his retreat at *Ostend*, addressed a long letter to *Tweed*, which repeated in greater detail the substance of the above statement, and the terms on which alone he was prepared to treat, stating that "until my release from the trust and all past liabilities thereof, except so far as the provision or payment of interest and premium on policy to secure the principal debt, is handed in exchange to me for same, not one shred of parchment will leave the custody in which they now are in. Of course I have not left them at my office; it would be hardly likely I should do that."

Under these circumstances the Plaintiff had filed his bill against *Crealock* and *Stephens*; *Lewis*, *Beavan*, and *Pugh* (the purchasers in 1859); and *Price*, the purchaser in 1870, charging that his signature to the deed of reconveyance was obtained from him by *Crealock* by fraud, and that *Stephens* was a party to such fraud, and alleging that the connection of *Stephens* with the frauds committed by *Crealock* was evidenced by his joining *Crealock* in concealing the evidence of the mortgage upon the alleged sale in 1859, and by his sending his son in August, 1870, to inquire whether the deeds of conveyance and reconveyance had been executed by the Plaintiff; and charging that he (the Plaintiff) was entitled as against *Stephens*, and all persons claiming under him (who either directly or indirectly through their solicitors had notice of the mortgage security), to require that no portion of the property still subject to the mortgage security should be redeemed except upon the terms of payment, as well of all such moneys as might not have been paid off to *Crealock* from time to time by means of the frauds referred to, as also of all such moneys as had through the collusion of *Stephens* come to the hands of *Crealock* without the knowledge of the Plaintiff, and, in particular, that the £3080, and £1500 (allowed by *Stephens* to pass into *Crealock's* hands), were still a charge

V.-C. B. 1873 HEATH v. CREALOCK.

upon the property now comprised in such security. All knowledge of the transactions of 1859, and any authority to *Crealock* to receive the £1500 in 1870, were distinctly denied by the Plaintiff. The relief prayed by the bill was (1) that the deed of reconveyance to *Stephens* of the property stated to have been sold in 1859 might be ordered to be delivered up to be cancelled; (2) that *Stephens* might be ordered to hand over the same, and be restrained from passing the said deed to the alleged purchasers of the property comprised therein, or any person claiming under them, and from passing to such purchasers, &c., the legal estate affected to be dealt with by such reconveyance, and from dealing with such deed in any manner detrimental to the interests of the Plaintiff as mortgagee and owner of the legal estate comprised in such deed; (3) a declaration that *Stephens* had not discharged himself of his liability to pay to the Plaintiff the £3080 and £1500, but was still liable under his mortgage deed of the 24th of November, 1856, to pay such sums, and all interest thereon, and a declaration that the said sums were still a charge upon the properties comprised in the mortgage security, and that the properties alleged to be comprised in the reconveyance, and the property alleged to have been sold to *Price*, were still subject to the said mortgage security; (4) an account of principal and interest due on the mortgage security, and in default of payment by Defendants other than *Crealock*, a foreclosure; (5) that upon redemption all proper directions be given for vesting in the redeeming defendants any estate still remaining vested in *Crealock* in the properties redeemed; and (6) that, upon foreclosure, the defendants *Lewis*, *Beavan*, *Pugh*, and *Price*, might be ordered to deliver up to the Plaintiff, or as the Court should direct, all deeds and writings in their custody or power relating to the properties comprised in the mortgage security.

The Defendant *Crealock* had not returned within the jurisdiction, and the mortgage deed of November, 1856, was still in his possession. He had put in an answer admitting the receipt and misappropriation of the money in 1859 and 1870, but exonerating *Stephens* (who was, as far as he knew or believed, in utter ignorance of his dealings with the money) from all participation in the breaches of trust complained of in the bill; and also stating that

the conveyances to the purchasers in 1859 were executed by *Stephens* wholly on the faith of his (*Crealock's*) undertaking to procure a reconveyance of the property, and his explanations of the impossibility of then obtaining it from the Plaintiff's absence abroad; and that although *Stephens* had joined in concealing from the purchasers the existence of the mortgage, it was done without any fraudulent intention on his part towards the Plaintiff.

The other Defendants had all put in answers, and as the nature of their defence will sufficiently appear from the arguments and the judgment, it will be sufficient to state that the purchasers of 1859 and 1870 insisted upon their title as purchasers for value without notice, and the protection afforded by the Court to persons in that position; that the Plaintiff was by his own act and deed estopped from denying the receipt of the purchase-money and the execution of the deeds of conveyance and reconveyance, and that if fraud had been committed, as alleged by the Plaintiff, that he himself, by his own gross and culpable neglect, and his misplaced confidence in his co-mortgagee, had largely contributed to that fraud, and that he, rather than the purchasers, who were wholly innocent, must suffer for it.

Stephens insisted that the charges made against him by the bill that he had been a party to *Crealock's* frauds, that he obtained a fictitious credit from *Crealock* and paid him a price for getting a false receipt, and that he colluded or combined with him for the purpose of deceiving the Plaintiff and the purchasers, were untrue and unjustifiable. He also relied upon the receipt given by *Crealock* in 1859, and that signed by the Plaintiff in 1870, as valid and effectual discharges for the amounts mentioned therein.

Mr. *Kay*, Q.C., and Mr. *Bedwell*, for the Plaintiff:—

Stephens had full knowledge of, and deliberately concurred in, the fraud practised by *Crealock*, and cannot avail himself, or the purchasers from him, of the legal estate which was fraudulently obtained from the Plaintiff by means of the reconveyance; and he is a bare trustee of that legal estate for the Plaintiff. His payment to *Crealock*, one of two trustees, made not only without any authority from the Plaintiff, the other trustee, but with knowledge

V.-C. B. 1873 HEATH v. CREALOCK.

that the Plaintiff was ignorant of the transaction, is not such a payment as will discharge him from the mortgage debt: *Webb* v. *Ledsam* (1). With respect to the Defendants *Lewis*, *Bevan*, and *Pugh*, who purchased from *Stephens* in 1859, and claim, as purchasers for value without notice, to be entitled to hold the deeds then handed over to them, as a protection against the Plaintiff's claim, we say that as those deeds were fraudulently handed over by *Crealock* in breach of his trust, the Defendants (who have not acquired the legal estate) are not entitled to derive any benefit from that fraud, or to retain possession of the deeds against the Plaintiff claiming under his prior legal mortgage, and representing the *cestuis que trust*: *Thorpe* v. *Holdsworth* (2); *Newton* v. *Newton* (3).

Mr. *Fischer*, Q.C., and Mr. *W. Barber*, for *Stephens*:—

The charges raised by the bill against *Stephens*, of complicity and concurrence in *Crealock's* fraud, are not sustained by the facts of the case. He has been equally victimised. He has paid the mortgage debt, and though guilty of negligence, his negligence has not been of such an extent as to amount to constructive fraud within the rule laid down in *Evans* v. *Bicknell* (4). In the absence of fraud on the part of *Stephens*, or knowledge of, or participation in *Crealock's* breach of trust, the receipt given by *Crealock* for himself and his co-trustee for their joint debt binds the Plaintiff, and operates *pro tanto* as a good discharge to *Stephens* of the mortgage debt. At law payment to one of two joint creditors and production of such a receipt is a good discharge as to both: *Husband* v. *Davis* (5); without alleging any authority from the other to receive the money: *Wallace* v. *Kelsall* (6). Either of the two trustees had a right to receive the money, and *Stephens* is effectually discharged in this Court as well as in a Court of Law: *Charlton* v. *Earl of Durham* (7).

As to the £1500, we rely upon the receipt signed by the Plaintiff and the reconveyance.

(1) 1 K. & J. 385. (4) 6 Ves. 174, 191.
(2) Law Rep. 7 Eq. 139. (5) 10 C. B. 645.
(3) Ibid. 4 Ch. 143. (6) 7 M. & W. 264.
(7) Law Rep. 4 Ch. 433.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for *Beavan* and the executors of *Lewis* (two of the purchasers in 1859):—

Having purchased for valuable consideration, without notice of Plaintiff's mortgage, from *Stephens*, who was in possession with an apparently good title in fee simple, we are entitled to avail ourselves of every honest defence, however technical. The root of the Plaintiff's case is a mortgage executed by *Stephens*, but the mortgage deed is not produced, and there is no proof, either by evidence or by admissions, that such a mortgage was ever executed. It is alleged that the deed is in the possession of *Crealock*, but what evidence is there of any steps taken to procure it, or that *Crealock* is unwilling to produce it? There being, therefore, no conclusive evidence of the impossibility of producing, or proving the loss of the original document, secondary evidence of its contents cannot be admitted. But assuming that secondary evidence is admissible, what evidence is there of the accuracy of the copy which is tendered? and being a mere copy of a copy it is no evidence of the missing original document: *Taylor* on Evidence (1); *Roscoe* on Evidence (2). Nor is the re-conveyance any evidence of the mortgage, which is not produced, as against the Defendants, who were not parties to it, and therefore were not bound by the recitals therein contained. But if held binding on the Defendants, then the recitals that the Plaintiff has received the mortgage money, and the receipt for it signed by him, are no less binding upon him.

There is no evidence of any trust affecting the money, and the Plaintiff and *Crealock* must be regarded as mere joint tenants equally entitled to the money. So far, therefore, as *Crealock's* moiety is concerned, the Plaintiff cannot recover.

We rely on our title as *bonâ fide* purchasers for value without notice, who, according to the well-established doctrine of equity, will not be deprived of any advantage they have gained by the possession of the deeds or otherwise, and against whom the Court will not "stir to give any assistance": *Head* v. *Egerton* (3); *Walwyn* v. *Lee* (4); in which case the only difficulty pressing upon Lord *Eldon* was that the Plaintiff, who there sought discovery and delivery of the title deeds of an estate mortgaged by his father,

(1) § 497.
(2) Page 15.
(3) 3 P. Wms. 280.
(4) 9 Ves. 24.

V.-C. B. 1873 HEATH v. CREALOCK.

had got possession, but the ultimate decision was that against a purchaser for valuable consideration without notice this Court gives no assistance. This protection has been extended to the case of a purchaser of an equity only, who is equally entitled "by way of defence to avail himself of the character of purchaser without notice, and to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title": *Bowen* v. *Evans* (1). Again, in *Joyce* v. *De Moleyns* (2), Lord *St. Leonards* says: "The defence of a purchase for value without notice is a shield as well against a legal as an equitable title; . . . in this Court they have a right to say that they ought not to be compelled to deliver up the deeds, as they obtained them *boná fide* and without notice."

This application by Lord *St. Leonards* to the case of a merely equitable title of the protection afforded by the plea of purchase for value without notice, though questioned, has never yet been overruled: *Frazer* v. *Jones* (3); *Attorney-General* v. *Wilkins* (4); and has been expressly recognised in the House of Lords in *Colyer* v. *Finch* (5); where Lord *Cranworth* says that "the principle on which the Court protects a purchaser for valuable consideration without notice is not confined to the case of a purchaser for valuable consideration who has got the legal estate. . . . It may be that he has not the legal estate, but that will be quite unimportant as to a Court of Equity interfering or refusing to interfere." Again, in *Hunt* v. *Elmes* (6) a decree for foreclosure having been made against a subsequent purchaser without notice, at the suit of the prior mortgagee (7), that part of the decree by which the deeds were ordered to be delivered up to the mortgagee was reversed: *Thorpe* v. *Holdsworth* (8); where the Defendants were ordered to produce the deeds in their custody for the purposes of a sale of a moiety of the property, in which they were not interested, only shews that Vice-Chancellor *Giffard*, though he considered himself bound by *Wallwyn* v. *Lee* (9), and *Joyce* v. *De Moleyns* (10), would not, if the matter had been *res integra*, have extended the rule to equitable

(1) 1 J. & Lat. 178, 264.
(2) 2 Ibid. 374, 377, 379.
(3) 17 L. J. (Ch.) 353.
(4) 17 Beav. 285.
(5) 5 H. L. C. 905, 920.
(6) 2 D. F. & J. 578.
(7) 28 Beav. 631.
(8) Law Rep. 7 Eq. 139.
(9) 9 Ves. 24.
(10) 2 J. & Lat. 374.

interests. So in *Newton* v. *Newton* (1) the rule was not disputed, but it was held not to apply to a case where the person proposing to create the charge was a mere stranger, and had no interest whatever in the subject matter which he purported to charge.

[The VICE-CHANCELLOR referred to *Gibson* v. *Overbury* (2), where it was held that the assignees of a bankrupt could not recover in trover a policy of assurance effected by the bankrupt, and deposited by him before his bankruptcy with the Defendants as a security for a balance due to him, and for a further sum then lent.]

But we do not require the assistance of *Joyce* v. *De Moleyns* (3), or the other cases which shew that the Court will not interfere against the purchaser for value without notice of a mere equity, as we have got the legal estate and have acquired a perfectly good title by estoppel.

The conveyance by which *Stephens* purported to convey to us the legal estate acted as an estoppel against him, and the reconveyance executed by the Plaintiff operates to feed that estoppel by perfecting the title in *Stephens*, which he purported to pass to us in 1859: *Smith's* Leading Cases (4). Then it is said that the reconveyance is tainted by the fraud of *Crealock*, under which it was obtained, and therefore that it is wholly inoperative. But the rule that third parties cannot derive any benefit from the fraud, does not apply to the case of a purchaser for valuable consideration without notice, who will not be deprived by a Court of Equity of any advantage at Law which he has fairly obtained for his protection: *Eyre* v. *Burmester* (5). Such a purchaser's plea of a purchase for valuable consideration without notice, "is an absolute, unqualified, and unanswerable defence, and an unanswerable plea to the jurisdiction of this Court." When once the terms of the plea have been satisfied, "this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage, which he has obtained, whatever it may be:" *Pilcher* v. *Rawlins* (6); *Carter* v.

(1) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(2) 7 M. & W. 555.
(3) 2 J. & Lat. 374.
(4) Vol. i. p. 79, ii. 671.
(5) 10 H. L. C. 90, 103.
(6) Law Rep. 7 Ch. 259, 268, 269.

8 Jur. N. S. 1019

V.-C. B. 1873 HEATH v. CREALOCK.

Carter (1). We further say, that as between ourselves and Plaintiff, we have the better equity. The question being who is to bear the loss occasioned by *Crealock's* fraud? we submit that Plaintiff, who trusted as his agent a man who has turned out to be a knave, must suffer for that fraud rather than Defendants, who have been guilty of no negligence, have trusted no one, and honestly taken a conveyance on the faith of which they have paid their money: *Hunter* v. *Walters* (2); *Pilcher* v. *Rawlins* (3). Nothing that we, the purchasers, could have done, would have discovered the fraud, whereas the Plaintiff, who might have prevented it, has by negligence in his duty as trustee contributed to its commission. We have, therefore, the better equity, and the Court will not interfere in favour of the Plaintiff to disturb our title as purchasers for value without notice.

With respect to *Price*, against whom the bill must be dismissed with costs, the Plaintiff has no equity to throw the £1500 received from him by *Crealock* upon these Defendants.

Mr. *Eddis*, Q.C., and Mr. *Ingle Joyce*, for *Pugh*, adopted the same line of argument, and referred to *Sugden's* Vendors and Purchasers (4), for a summary of the law as to the protection afforded in equity to a purchaser for value without notice.

Upon the operation of the doctrine of estoppel in favour of the Defendants, they cited *Sturgeon* v. *Wingfield* (5).

Mr. *Hardy*, Q.C., and Mr. *Charles Browne*, for Defendant *Price*.

Mr. *Kay*, in reply:—

It is not competent for the Defendants to dispute the existence of the Plaintiff's mortgage, as their admissions contain a full copy of it. We prove that *Crealock* always (and the Plaintiff never) had possession of the mortgage deed, and that he absolutely declines to part with that or any other document except upon terms which cannot possibly be complied with. "This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient" to entitle

(1) 3 K. & J. 617. (3) Law Rep. 7 Ch. 259, 273.
(2) Law Rep. 7 Ch. 75, 85. (4) Pages 607, 608.
(5) 15 M. & W. 224.

the Plaintiff to give secondary evidence of the paper or deed: *Brewster* v. *Sewell* (1). It is said that we ought to have given notice to produce to *Crealock's* solicitor, before this secondary evidence can be admitted; but when notice to produce is a mere idle form, it may be dispensed with: *Cates* v. *Winter* (2); *Taylor* on Evidence (3); and the Courts will favour the sufficiency of the notice whenever the circumstances of the case warrant them in so doing: *Bryan* v. *Wagstaff* (4). Upon the merits, the Plaintiff is entitled to undo the fraud and set aside the transactions based upon it entirely, and the Defendants who have not acquired the legal estate even as against *Stephens*, cannot avail themselves of the plea of purchasers for value without notice. If *Stephens* and *Crealock* have no valid defence to the Plaintiff's claim, the Defendants claiming under them can have none. The technical doctrine of estoppel has no application whatever, and in any case could not affect the Plaintiff's rights as against persons who are neither parties nor privies to the reconveyance.

But these Defendants have got no legal estate, but only a mere equity, the legal estate being in *Stephens*, who obtained it by fraud, and is a bare trustee of it for the Plaintiff. The reconveyance which the Plaintiff was induced to execute for a special purpose, and to carry out a pretended sale, was executed and delivered upon condition, and until that condition was fulfilled was a mere escrow, "that is as a scroll or writing which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes:" *Stephen's* Comm. (5). There was no complete delivery of it in any sense, so that it cannot be recalled. But, in any case, complete or not complete, the reconveyance can be obtained back with the estate from *Crealock* and *Stephens*, by reason of their fraud, and no right can be set up by the Defendants (who have merely an equity) against the Plaintiff's right, there being no case in which a subsequent purchaser has been allowed to avail himself of the plea of purchase for value, against the fraud of his vendor, unless he has obtained some legal advantage. The Defendants are not, therefore, entitled to retain the

(1) 3 B. & A. 296, 299.
(2) 3 T. R. 306.
(3) Pages 438, 448.
(4) Ry. & Mood. 327.
(5) Vol. i. p. 503.

V.-C. B. 1873 HEATH v. CREALOCK.

deeds as against the Plaintiff's prior legal mortgage, which gives him a right to call upon the purchasers from the mortgagor, to redeem at once, or in default, to be foreclosed: *Colyer* v. *Finch* (1); nor even as against his equitable title, *Newton* v. *Newton* (2), where the Court, going a step beyond *Thorpe* v. *Holdsworth* (3), ordered the deeds to be not only produced but to be delivered up, in order to assist the Plaintiff, whose prior equitable title was established, in working out his right; so as not to make an obviously incomplete decree by leaving the title-deeds in the possession of one of the Defendants claiming to hold them under an adverse title which had been declared by the same decree to have no valid foundation. In leaving the deed in the hands of *Crealock*, the Plaintiff has not been guilty of negligence so as to affect his right to relief; it being settled that trustees are justified in committing the custody of the deeds to one of themselves, and that where the deeds are a security for money, possession by the one is no authority from the co-trustee to him who holds them to receive the principal money secured: *Lewin* on Trusts (4). We ask for a sale instead of a foreclosure of the mortgaged property, as the more convenient form of decree: 15 & 16 Vict. c. 86, s. 48.

Mr. *Amphlett* replied upon the points raised in reply:—

It is not open to Plaintiff at the bar to set up the reconveyance as an escrow, inconsistently with the pleadings, which treat it as executed and delivered absolutely and not conditionally: "In the delivery of a deed as an escrow, the form of words used in the delivery must be apt and proper, as: 'I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that, &c.,' and the delivery must be to a stranger; for if a person delivers a deed to the party himself to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately," *Cruise*, Dig. (5); *Sheppard's* Touchstone (6); *Co. Litt.* (7).

As to the form of decree, the Plaintiff suing as mortgagee must

(1) 5 H. L. C. 905. (4) Page 483.
(2) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143. (5) Tit. xxxii. 'Deed,' ch. ii. ss. 93, 94.
(3) Law Rep. 7 Eq. 139. (6) Page 58.
(7) Page 36 (a).

make out a special case in order to induce the Court to order a sale when the mortgagor or subsequent incumbrancer dissent: *Morgan's* Chan. Acts and Orders (1).

Dec. 10. SIR JAMES BACON, V.C:—

The question to be determined in this case is one of considerable difficulty and of great importance. Difficult, because of the somewhat complicated facts attending parts of the case, and because it is necessary to ascertain in what manner a loss which has been sustained shall be borne among persons some of whom are not morally culpable in respect of the circumstances which have led to the loss; and important, because of the principles by which the decision of this Court must be guided in such like cases, which are unhappily of not unfrequent occurrence:—[His Honour, after stating the facts of the case, continued:—]

The defences to this suit are various, as are the interests of the several Defendants—and their several cases are necessarily the subject of different considerations. But the first to be regarded is that of the Defendant *Stephens*, who denies all liability in respect of the misconduct of *Crealock*, insists upon the validity of the deeds of conveyance and reconveyance of 1870, and alleges that he was a bare trustee of the legal estate which he thereby acquired for the purchasers from him in 1859 of the property which was in that year sold by him to them. It becomes, therefore, necessary to consider the conduct of *Stephens*, and the nature of his dealings with *Crealock*. I have pointed out the relation in which they stood to each other. The accounts stated between them, which have been put in evidence, shew that their pecuniary dealings were such as would take place between a solicitor and client, or between principal and agent, customer and banker; and that in all these transactions *Crealock* acted, and was considered by *Stephens* as acting, not as trustee for others, but as conducting and accounting for the business of *Stephens* alone. When the sales in 1859 took place the whole sum of £3080 was received by *Crealock*—although upon the account as it then stood a balance was due from him to

(1) Page 205.

V.-C. B. 1873 HEATH v. CREALOCK.

Stephens after debiting himself with that sum, and when *Stephens* procured the delivery of the title deeds he must be taken to have known that *Crealock* had no right to deliver those deeds. After the time when the deeds were so delivered, by which *Stephens* was enabled to deduce a title to the portion sold by him, and after the completion of the several purchases, *Crealock* gave *Stephens* a receipt, dated the 23rd of February, 1859. Upon this receipt *Stephens* now relies, and insists that it is a good discharge at Law and in Equity. In my opinion there is no ground for any such contention. Mr. *Heath*, the Plaintiff, was at this time in *England;* his residence and position were well known; there could be no difficulty in communicating with him, and it is clearly proved that until 1870 the Plaintiff had no notice or intimation that there had been any transaction by which the mortgage security could be in any degree affected. Without dwelling on the fact that *Stephens* is a lawyer, I think that, having regard to the true nature of his dealings with *Crealock*, it is obvious that he chose to trust him (as far as he did trust him) in his individual character of his agent or banker, and not as a trustee who had the authority of his co-trustee for acting as he did. It would be in the highest degree dangerous, and opposed to all the principles of this Court, if it were to be held that by any such proceeding as was here resorted to, the validity of the mortgage made to two trustees could be impeached or affected, because one of them has been allowed, and more than allowed, by the mortgagor to betray his trust. In the year 1865, the *Central Wales Railway Company* required and took a small portion of the mortgaged property (15 perches sold for £10), and upon that occasion a conveyance was approved and executed by *Stephens*, in which the Plaintiff and *Crealock*, described as mortgagees in fee of the hereditaments described, acting in pursuance of the power of sale vested in them as such mortgagees—and the Defendant *Stephens*, described as the owner in fee of the same hereditaments subject to the mortgage, convey to the company the premises "which, with certain other hereditaments, were, by an indenture dated the 24th of November, 1856, made between *Stephens* of the one part, and the Plaintiff and *Crealock* of the other part, conveyed subject to redemption by *Stephens* of the principal sum of £7700 with interest." And upon this occasion the £10 was

paid to and received by *Stephens* with the consent of the mortgagees.

Excepting some correspondence between *Crealock* and *Stephens*, which is set forth in the pleadings, but to which I do not find it necessary to refer more particularly, nothing seems to have taken place from 1859, when *Stephens*, representing himself to be the absolute owner of the portions sold, had conveyed those portions to the several purchasers, until the year 1869, when he contracted to sell another portion for £1500 to *William Price*, one of the Defendants. The necessity of procuring a reconveyance of so much of the mortgaged property was then urged. In the face of the Act of Parliament (22 & 23 Vict. c. 35) Mr. *Stephens* felt himself compelled to disclose the fact of the existing mortgage, and the two deeds I have before mentioned were accordingly prepared. Mr. *Stephens* at this time—August 1870—seems to have distrusted *Crealock*, as, indeed, after the letters of March and August, which I have before referred to, he might well do:—[His Honour, then referred to the transactions of August and September, given in the statement, and the following passage in the answer of *Stephens*:—"The said deed of reconveyance was handed by the Defendant *Crealock* to my son for me as hereinbefore stated, and is now in my possession. It has, in fact, been in my possession ever since it was so handed to me, but not previously thereto. I do not intend to attempt to make any terms whatever with the purchasers of the property comprised in the said sales for £3080 for whom I am, as I am advised and submit, a bare trustee without any beneficial interest whatever, nor do I intend to endeavour to pass the legal estate to them, unless they demand it, which I believe they are entitled to do, or without the sanction of this Honourable Court, and I altogether deny and dispute that the Plaintiff is entitled to set up or maintain the position assumed on his behalf in par. 22 of the bill."]

That is, in plain English, "having in 1859 represented to purchasers that I was the owner (as I was not) of the portions I then sold and purported to convey to them with the assistance of *Crealock* as my solicitor; those purchases being completed by the payment of the purchase-money, part of which was received by *Crealock* as my agent, and such part as he did receive being

V.-C. B. 1873 HEATH v. CREALOCK.

included in an account current between him and me, I insist and rely upon a form of receipt which he gave to me, which is not only informal and unbusinesslike and wholly ineffectual, but which is untrue in its terms, and wholly inconsistent with the true state of the case. And I further insist that, knowing that no portion of the £3080 had been duly applied, but that it was due from *Crealock* to the trust estate, that he was wholly without the means of paying it, and that he must call his creditors together if the fact of his delinquency should be exposed to the Plaintiff, his co-trustee, I not only permitted but procured the payment to him by *Price* of £1500, and made the delivery of the reconveyance to me a condition precedent to his receiving the latter sum" —a reconveyance which was, and is, wholly fraudulent; and upon these grounds he suffers this cause to come to a hearing. And his counsel have complained that the bill charges him with fraud! That he has acted with most singular negligence is not disputed; that the Plaintiff, if he is not entitled to the redress he seeks, will have suffered most grievously by that negligence and imprudence is apparent; and if I could explain satisfactorily the conduct the Defendant *Stephens* says he practised in August and September, 1870, I would willingly accept an excuse for such conduct, but I can find none.

As far, then, as *Stephens* is concerned, I am of opinion that the Plaintiff is entitled to the relief he seeks; to have it declared that the reconveyance of the property sold and conveyed in 1859 has been obtained by the Defendant wrongfully, and that he be ordered to deliver it up to be cancelled; and a further declaration, that the whole of the original mortgage debt due from the Defendant *Stephens* remains charged upon the whole of the hereditaments comprised in that mortgage, except only so much as has been conveyed to *Price*, against whom, as a purchaser for valuable consideration without notice, the bill must be dismissed with costs. Beyond this there will be the ordinary decree for account of principal, interest, and costs.

The cases of the other Defendants, *Lewis*, *Beavan*, and *Pugh*, whose cases may be considered as one for the purposes of this suit, remain to be considered, They are no doubt purchasers for value without notice, and are entitled to all the protection which the

rules and the practice of the Court extend to persons in their position; and they are entitled to avail themselves of any just objection, technical or otherwise, to the Plaintiff's demand. And in the exercise of this right it has been argued by their Counsel that there is no sufficient evidence of the original mortgage deed. Let us see how this stands. The fact is abundantly admitted by the Defendant *Stephens*, as well in the pleadings as by the copy which he has furnished of the deed itself, and by the recitals in the deeds executed by him. It is further sufficiently proved that the deed is, or ought to be, in the possession of *Crealock*, and that it is out of the power of the Plaintiff to compel the production by him. All that the law of evidence requires is, that the best evidence of which the case is susceptible shall be adduced; and although the Defendants say, and say truly, that no admission by *Stephens* or *Crealock* can be used as direct evidence against them, they are nevertheless subject to the rule I have stated. The Defendants have in no part of their answer raised any direct issue on this point. They nowhere dispute the existence of the mortgage as it is alleged by the Plaintiff. The utmost they say is, "if there was such a mortgage, and if it is still subsisting"—then their defence is so and so. In my opinion, this form of pleading does not make it incumbent on the Plaintiff to prove the mortgage more directly against them. Their defence is, that they are purchasers for value, &c.; and they plead and say in substance: "We care not whether there was, or was not, or is, or is not, the mortgage, for supposing there is, we have a title which your mortgage cannot disturb." If I thought there was any weight in the objection, I should have directed the cause to stand over that better evidence might be adduced by the Plaintiff; but I do not think so, not only for the reason I have mentioned, but because the Defendants, each and all of them, rely upon the reconveyance of 1870, which contains a full recital and recognition of the mortgage, and proceeds upon the footing of its validity and existence, and one of the Defendants sets it out in his answer *in extenso*. Their defence, on the ground of their being purchasers for value without notice, was that which was most insisted on, and that because the bill prays the delivery up of the title deeds. I think, however, that the argument on this subject has been pressed beyond its legitimate

V.-C. B. 1873 HEATH v. CREALOCK.

extent. It is true that a Court of Equity will not assist a person having a claim against a purchaser for value without notice. But there the rule stops; nor is there any difference between the rules in Equity, and those which prevail at Common Law. If my chattel is stolen I can compel its restitution, in some cases by action, in others by summary proceedings before a magistrate. If my land is transferred, no matter by what form of transfer, I can bring ejectment; and there is a reason apparent, at least sufficient to form a basis for the rule—that a Court of Equity will not actively assist a person who can assert his right at Law. But if the relief I claim is foreclosure, or realising the subject pledged to me, the rule and the reason cease to be applicable, and I know of no case in which, where the suit has been to foreclose, or to realise a thing charged or pledged, a subsequent title, however innocently acquired, has been held to be a sufficient defence to such a claim. Certainly none of the cases cited furnish any authority for such a proposition. In *Head* v. *Egerton* (1) the Plaintiff's bill prayed foreclosure and the delivery of title deeds. A subsequent mortgagee pleaded to so much of the bill as prayed delivery of title deeds, that he was a purchaser for value, &c., and his plea was allowed; but I have no reason to suppose, either from the report or from the nature of the case, that the Plaintiff's title to foreclose was affected by the allowance of the plea. *Wallwyn* v. *Lee* (2) was a similar case. The bill was not to recover the estate but for delivery up of title deeds. The plea was only to so much of the bill as sought the discovery and delivery of the title deeds; and that plea was allowed, Lord *Eldon* saying: "The principle of the Court is, that against a purchaser for valuable consideration without notice this Court gives no assistance." *Joyce* v. *De Moleyns* (3) was an administration suit, and the bill sought to compel the delivery of deeds which had come into possession of the Defendants without notice. Lord *St. Leonards* dismissed the bill against them, as he expressly says, on the authority of *Wallwyn* v. *Lee*, which he considered to be in point. In *Newton* v. *Newton* (4) Lord *Hatherley* considers the two cases I have last mentioned, and points out the distinction between them and cases in which the

(1) 3 P. Wms. 280.
(2) 9 Ves. 24.
(3) 2 J. & Lat. 374.
(4) Law Rep. 4 Ch. 143.

beneficial interest in the estate was properly subject to the decision of a Court of Equity. In that case the decision of the Master of the Rolls (1) was reversed, not upon the law, but upon the facts, the Lords Justices coming to a conclusion different from that of the Master of the Rolls; but Lord *Hatherley* desired to be understood as not entertaining any opinion adverse to that expressed by the Master of the Rolls upon the question of law, the Master of the Rolls having decided as matter of law that the Defendant was compellable to deliver the title deeds. In *Hunt* v. *Elmes* (2) the Plaintiff, a mortgagee of an entire estate, filed a bill of foreclosure against the Defendant who, upon subsequently purchasing a part of the estate, had the title deeds of the entirety delivered to him by a fraudulent solicitor. The Plaintiff's right to foreclose, which had been declared by the decree, was varied by omitting from it that part which ordered the delivery up of the deeds. The point does not seem to have been argued; no authorities were referred to upon it, and the Plaintiff was a mortgagee for a term only. In *Thorpe* v. *Holdsworth* (3), before Vice-Chancellor *Giffard*, it was held that the possession of title deeds by a puisne mortgagee did not give him priority, and that although the Court could not order the Defendant, who was an incumbrancer for value, &c., to be deprived of the custody of the deeds, yet, a sale being ordered, the production of the deeds for the purpose of the sale was ordered; and the Vice-Chancellor said, that upon the application of a purchaser (who by the order was to be at liberty to apply at Chambers as he might be advised) he should not hesitate to order the deeds to be delivered to the purchaser. But in *Colyer* v. *Finch* (4) a case which appears directly applicable came to be decided. The bill was by *Finch* for foreclosure against *Colyer*, a subsequent purchaser without notice. The Master of the Rolls (5) states the law thus: "If the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this Court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and

(1) Law Rep. 6 Eq. 135.
(2) 2 D. F. & J. 578.
(3) Law Rep. 7 Eq. 139.
(4) 19 Beav. 500.
(5) 19 Beav. 509.

V.-C. B. 1873 HEATH v. CREALOCK.

attached to that legal title there is an equitable remedy, or an equitable right, which can only be enforced in this Court, I have not found any case, nor am I aware of any, where this Court will refuse to enforce the equitable remedy which is incidental to the legal right;" and he made a decree for foreclosure in the ordinary form, from which *Colyer* appealed. On the hearing of the appeal (1), *Joyce* v. *De Moleyns* (2) and other cases were cited in support of the Appellant's contention, that he was a purchaser for value without notice. Lord *Cranworth,* in the course of the argument (3), expressed doubts whether the rule of not interfering against such a purchaser applied to a case of foreclosure; and in delivering his reasons for the judgment (4) he notices the argument that the Court will not interfere, and thinks that an "entire fallacy." He says that there is no difference whether the purchaser has or not the legal estate. "His equity depends on this, that he stands equitably in at least as favourable a position as his opponent, and therefore the Court will not interfere against him. But I think that that doctrine cannot by possibility apply to the case of a bill of foreclosure."

Then, after referring to the reasons for so holding pointed out by the Master of the Rolls in his judgment (5), he goes on: "But I should proceed on a much shorter ground. For the purpose of that question, whether the Court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor, for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage, and that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem.'"

This being, as I consider, a most clear authority applicable to the case before me, I am led to consider what are the rights of the parties in this foreclosure suit. That the legal estate was duly vested in the Plaintiff and *Crealock* by force of the mortgage deed

(1) 5 H. L. C. 905. 3 Jur N S 25. (3) 5 H. L. C. 915. 3 Jur N S 25.
(2) 2 J. & Lat. 374. (4) Ibid. 920, 921. 3 Jur N S 25.
(5) 9 Beav. 510, 511.

of 1856 I take to be conclusively established. That by the conveyance of 1859 to the several persons who then purchased from *Stephens* no legal estate passed, seems to me to be equally clear. They could not buy, and he could not sell, what he had not. All that they could take and all that he could give, was an equitable interest. I see no reason to doubt that they could at any time file a bill to redeem the Plaintiff's mortgage and to foreclose *Stephens;* but this was the very utmost extent of the interest they acquired. That they have great reason to complain of the manner in which they were dealt with is obvious; but how can the Plaintiff be made answerable for that, or why are his legal and equitable rights, one of which is to foreclose against his mortgagor and all persons claiming under him, to be affected? The reply which the Defendants make to these inquiries is contained in their several answers, which are, in this respect, in the same terms:—

(*J. W. Lewis*). "I say that Plaintiff is by his own act and deed estopped from denying or challenging my title to the property so purchased by me. I claim the benefit of the said deed of reconveyance executed by Plaintiff in August, 1870, and sent by him or his solicitors to Defendant *William S. Crealock*, and of every aid to my title or advantage resulting therefrom. I claim the benefit of the receipt and discharge contained in and indorsed upon the said deed of reconveyance and signed by Plaintiff and Defendant *Crealock*. I say that Defendant *Stephens* is a bare trustee for me of the legal estate in the said property so purchased by me, and that I am the person at present having the best right to claim the conveyance of that legal estate, and I claim the same accordingly. Further, I say that I am a *bonâ fide* purchaser for valuable consideration, without notice of any fraud or wrongdoing, and I claim the advantage of all the doctrines of this Court in favour of a person standing in that position. Lastly, I say that if fraud has been committed, as alleged by Plaintiff, that he himself, by his own gross and culpable neglect, and his misplaced confidence in his co-mortgagee, has largely contributed to that fraud having been committed; and that as I am wholly an innocent party, and he is in my view of the case a person who has contributed by his negligence to the result which has ensued, he has made out no

V.-C. B. 1873 HEATH v. CREALOCK.

case against me, and that, so far as I am concerned, his bill ought to be dismissed with costs."

And upon this it was argued that the Plaintiff is estopped by his conveyance of 1870 procured by a direct fraud, *Stephens* knowing that the validity of the deed must depend upon the payment to the trustees of the sum mentioned as the then present consideration expressed in that deed, and knowing that not only was the sum not paid by him, but that *Crealock* was in such a hopeless condition of insolvency that if it was not paid the trust estate must lose it, procures that deed to be delivered to him and takes it as the price of his permitting the other sum of £1500 to be received by *Crealock;* if *Stephens*, having sold and conveyed to the Defendants, the purchasers, without a title, had afterwards obtained a perfect title, then, as between him and them, his subsequent title would no doubt have fed the estoppel, and would have entitled them to have their originally defective title made perfect by him. But the principle of estoppel applies only between parties and privies, and if the estate supposed to be acquired by *Stephens* under the reconveyance is destroyed by the cancellation of that conveyance, and before any estate can have passed from him to them, there can exist no food for the supposed estoppel; and the Defendants, the purchasers, are reduced to the position in which they would have been if no reconveyance had been executed, it being wholly out of the question to suggest that any equity exists as between them and the Plaintiff. If any authority were required to support a proposition so plain in law and so consonant with justice, it would be found in *Eyre* v. *Burmester* (1), which was referred to in the course of the argument. The defence upon this ground failing—as, in my judgment it does wholly fail—the case is reduced as to all the Defendants to a simple case of foreclosure. However much I may regret that loss, trouble, and expense should be inflicted upon perfectly innocent persons as the Defendants, the purchasers, undoubtedly are, I am compelled, in justice to the Plaintiff, to declare and order that the deed of reconveyance be cancelled, the consequence of which is that the Plaintiff is entitled to all such rights as he would have possessed if that deed had never been executed.

(1) 10 H. L. C. 90.

V.-C. B. 1873 HEATH v. CREALOCK.

An account must be taken of what is due in respect of the original mortgage for principal, interest, and costs, and *Stephens* must be ordered to pay the amount which upon taking such account shall be found to be due; and upon his failure to pay, and upon the Defendants, the purchasers, declining or failing to pay such amount, the Plaintiff will be entitled to realise his security. Under the circumstances of this case, it appears to me that the proper and just mode of realising that security is by a sale of the whole of the mortgaged hereditaments, excepting only that part which has been conveyed to the Defendant *Price*, and for the purposes of such sale, if and when it shall be made, the Defendants must be ordered to produce the title deeds in their respective possession, and to deliver up such title deeds to whoever may be the purchaser or purchasers; and liberty will be given to the Plaintiff to apply in Chambers as may be necessary to give full effect to this part of the decree.

Solicitors: Messrs. *Budd & Son*; Messrs. *Thomas White & Sons*; Messrs. *Batty & Whitehouse*; Messrs. *Combe & Wainwright*; Messrs. *Clarke, Son, & Rawlins.*

Powell v. *Rawle* (1874) L. R. 18 Eq. 243
Followed. *In re* AVARD, DECD.
HOOK *v.* PARKER [1948] 1 Ch. 43

POWELL *v.* RAWLE.

V.-C. B. 1874 *April* 21.

[1871 P. 41.]

Will—Legacy—Forfeiture of Legacy if not "claimed" within Three Months.

Direction by codicil to executors to invest £200 and pay the proceeds to testator's daughter, a single woman, for life, for her separate use, and after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within three calendar months after testator's decease, the bequest should lapse.

The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of the testator's death till nearly two years after he died; and it was admitted by the executors that no notice was given to her by them:—

Held, that the legacy had become forfeited, and had lapsed.

FURTHER CONSIDERATION.

Charles Powell, who died on the 13th of March, 1869, by his will, dated the 8th of May, 1865, amongst other devises and bequests, gave a legacy of £250 to one of his children, *Helen Jane Powell.*

V.-C. B. 1874

POWELL v. RAWLE.

By a codicil dated the 9th of March, 1869, the testator directed as follows:—

"I hereby revoke the legacy of £250 given by my said will to my daughter *Helen Jane Powell*, and in lieu thereof direct my said executors to invest the sum of £200 in the names of two or more responsible trustees to be appointed by my said executors, and to pay the proceeds of the same sum to my said daughter *Helen Jane Powell* during her life, for her own absolute use, free from the control of any husband with whom she may intermarry, and after her decease the said capital sum to be in trust for all and singular the lawful children of my said daughter, equally, share and share alike, as tenants in common, and not as joint tenants. And I declare that the trustees so to be appointed by my said executors shall have all usual trustees' powers, whether given by Act of Parliament or otherwise: Provided always, and this bequest is upon the express condition, that if the said bequest be not duly claimed by my said daughter within the space of three calendar months next after my decease, that then the said bequest shall lapse, and the amount thereof fall into and be considered as part of my residuary personal estate and be applied accordingly."

The bill, which was filed on the 11th of March, 1871, by the executors, for administration, alleged that at the time of the testator's decease it was not known to the Plaintiffs where the Defendant *Helen Jane Powell* resided, nor whether she was still alive, or had ever been married, or had any issue, and consequently no notice was given to her, or to any other person who might claim to be interested in the bequest of £200 in the said codicil contained, in favour of her and her children, of the conditions upon which the bequest was made, and under the circumstances no formal claim to the bequest was made by her within three months after the testator's decease; also that one of the Defendants representing the residuary legatees alleged that the bequest of £200 had lapsed, and that the amount was now distributable among the residuary legatees.

By a voluntary answer and an affidavit, the Defendant *Helen Jane Powell* submitted that the legacy of £200 had not been forfeited, though she did not claim the same within three months after the testator's death. She said she claimed the legacy as soon

as she was informed of it: that the trustees gave her no notice of it; and that she did not hear of it, or of the death of the testator, until February, 1871. Had she known, she would have claimed. She further submitted that if the Court should be of opinion that the clause of forfeiture took effect by her not having claimed the legacy, yet the forfeiture should not be extended beyond her own life interest, and that the legacy ought to be retained and paid to her children at her death.

The above point was now mentioned.

Mr. *Swanston*, Q.C., and Mr. *Ingle Joyce*, for the Plaintiffs:—

The circumstances that the legatee did not know of the legacy having been left to her, and that no notice was attempted to be given to her by advertisement or otherwise, will not avail, if the condition has been unperformed: *Burgess* v. *Robinson* (1); *Davis* v. *Angel* (2).

The VICE-CHANCELLOR:—This is a very hard case. The bill itself alleges that no notice was given to the legatee.

I have every wish to decide against the forfeiture if I can lawfully do so.

Mr. *Henry Fawcett* (Mr. *Kay*, Q.C., with him), for *Helen J. Powell*:—

The only suggestion to be offered in opposition to *Burgess* v. *Robinson* is, that as this legacy was an act of bounty, there was nothing which Miss *Powell* could by any act known to the law "duly claim," and hence that the clause of forfeiture is void. At least Miss *Powell's* life estate only will be forfeited.

The VICE-CHANCELLOR:—What act was this lady to do? In what capacity was she to have claimed?

Mr. *Swanston*:—I suppose as a creditor.

The VICE-CHANCELLOR:—I fear that the words are too strong. Nor can the life estate be separated from the remainder. The fund must fall into the residue.

Solicitors: Mr. *John Frost*; Mr. *Alfred Bilton*.

(1) 3 Mer. 7. (2) 31 Beav. 223. 8 June 1709

V.-C. H.
1874
March 11.

MUTLOW *v.* BIGG.

[1873 M. 29.]

Express Trust—Statute of Limitations (3 & 4 *Will.* 4, c. 27), *s.* 25—*Land on trust for Sale—Residuary Gift.*

Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:—

Held, that the trust was an express trust within sect. 25 of the *Statute of Limitations*, and a decree for the execution of the trust of the unsold land made at the suit of a residuary legatee.

Pawsey v. *Barnes* (1) distinguished.

EDWARD BIGG, by his will, dated the 6th of January, 1820, after giving certain legacies, made the following disposal:—"I give to my son *E. S. Bigg*, and my daughters *S. A.* and *E. F. Bigg*, whom I appoint executor and executrixes of this my will, my freehold houses in *Fenchurch Street* and *Fenchurch Buildings*, to hold the same to my said executor and executrixes in trust to sell and dispose of the same, and to convert the same into money, and the money arising by such sale to be considered as part of my personal estate; and I give all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, freehold, copyhold, and personal, to hold to them as tenants in common, their several and respective heirs, executors, administrators, and assigns, for ever."

The testator died on the 23rd of July, 1823, and his will was proved by *E. Smith Bigg* and *Sarah A. Bigg*, on the 8th of November, 1823.

Besides the freeholds specified in the will, the testator died possessed of certain freeholds in *Seven Dials*, and of considerable personal estate. The executor entered into possession and sold the real estate, and paid his sisters sums on account of the interest on their shares, but never paid them the capital sums of the testator's estate to which they were entitled under the will. The daughter *Emma Frances*, shortly after the testator's death, went to reside with her brother, and died on the 9th of May, 1844, intestate. *E. Smith Bigg* took possession of her estate, but did not obtain letters of administration of her estate till 1859. *Sarah*

(1) 20 L. J. (Ch.) 393.

Anne Bigg died on the 18th of July, 1865. *E. Smith Bigg* died in February, 1871, having appointed his sister, the Defendant *Lucy Bigg*, his executrix.

On the death of *E. Smith Bigg*, his sister, the Defendant, *Lucy Bigg*, took possession of his real and personal estate.

On the 25th of January, 1873, administration *de bonis non* of the estate of *Emma Frances Bigg* was granted to her niece *Mary Ann Mutlow*, the Plaintiff.

The bill was filed in 1873, by *William Mutlow* and *Mary Anne* his wife, as administrators of *Emma Frances Bigg*, and prayed for execution of the will of the original testator, *Edward Bigg*, against *Lucy Maria Bigg*, the executrix of *E. Smith Bigg*, and *S. H. Bigg*, his heir-at-law. Two of the houses of the testator *Edward Bigg*, situate in *Fenchurch Street*, remained unsold. The Defendants by answer set up the *Statute of Limitations*.

Mr. *Dickinson*, Q.C., and Mr. *Bunting*, for the Plaintiff:—

This is an express trust for the sale of the real estates, and the relation between the trustee and the *cestui que trust*, the land not having been sold, is still subsisting; there has never been an adverse possession of the freehold so as to take the case out of the 25th section of the statute: *Sugden's* Real Property Statutes (1), and the cases there cited.

Mr. *Morgan*, Q.C., and Mr. *Marcy*, for the Defendants:—

In *Pawsey* v. *Barnes* (2), where a testator devised his real estate to trustees on trust to sell, and the will was proved in 1816, but no claim was made by the persons entitled to the proceeds until after the death of the surviving executor, in 1849, it was held to be too late. It is true that the case was not decided on the statute.

In *Bowyer* v. *Woodman* (3) it was held that a married woman entitled to a charge on land could only claim six years' interest, viz., that the claim was within the 42nd section of the 3 & 4 Will. 4, c. 27; moreover, this is in effect a gift of residue, and a residue charged on land is within the statute: *Sheppard* v. *Duke* (4), and *Prior* v. *Horniblow* (5).

(1) Page 99.
(2) 20 L. J. (Ch.) 393.
(3) Law Rep. 3 Eq. 313.
(4) 9 Sim. 567.
(5) 2 Y. & C. Ex. 200.

V.-C. H. 1874 MUTLOW v. BIGG.

There is clear laches in this case in the face of which this Court will not give relief. In *Ward* v. *Arch* (1) it was held that under the trust for sale the real estate must be held to be converted, and in that case the parties entitled to the proceeds might have applied immediately. In *Dickenson* v. *Teasdale* (2) it was held that a trust to pay debts was not an express trust within the Act.

SIR CHARLES HALL, V.C.:—

The Plaintiff is entitled to a decree. His claim is not to a legacy, but to a share of property given specifically to trustees to be sold for persons who were beneficial owners. The property given is real estate, which was held upon a trust for sale. Nothing has been done to affect their rights, no transfer, no sale; and the 25th section of the statute seems expressly applicable to the case. As regards the 40th section, it seems to me to have no application, except perhaps as regards the proceeds of that part of the property which has been sold. The part with which this bill seeks to deal is *in specie*.

With regard to the cases cited: In *Pawsey* v. *Barnes* (3) the property had been sold in the year 1839, and therefore that case has no application where the property exists in specie. In *Boyer* v. *Woodman* (4) the question arose on the 42nd section of the Act. After *Gough* v. *Bult* (5), Lord *St. Leonards'* opinion, and *Burrowes* v. *Gore* (6), I must hold that the proceeds of the sale of land, where there is an express trust, are within the 25th section. It has been argued that there is not an express trust of the land, the proceeds of sale being directed to be part of the personal estate, and the same persons being trustees and executors; but this mode of declaring the trusts does not make the proceeds of sale personal estate so as to exclude the 25th section. There must be a decree in favour of the Plaintiff, confined to the property which remains *in specie*.

Solicitors for the Plaintiff: Messrs. *Singleton & Tattershall.*

Solicitors for the Defendants: Messrs. *Prior, Bigg, Church, & Adams.*

(1) 15 Sim. 389.
(2) 1 D. J. & S. 52.
(3) 20 L. J. (Ch.) 398.
(4) Law Rep. 3 Eq. 313.
(5) 16 Sim. 323.
(6) 6 H. L. C. 907.

Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY.

In re LITTLER.

C. J. B.
1874
April 20.

Composition—Creditor holding Collateral Security—Right to retain Security—Equitable Mortgagee—Order for Sale—Jurisdiction—Bankruptcy Act, 1869, (32 & 33 *Vict. c.* 71), *s.* 126.

Two partners filed a liquidation petition. Their joint creditors resolved to accept a composition of 10*s.* in the pound in satisfaction of their debts. Among the creditors who voted in favour of the resolution was a banking company, who held security for their debt upon the separate estate of one of the partners. The affidavit by which they proved their debt stated their security, but they voted in respect of their whole debt. The resolutions contained no provision reserving the right of creditors who held collateral securities to retain them, but a provision to that effect was inserted in a deed afterwards executed to carry out the arrangements of the composition. The composition was duly paid to the bank:—

Held (reversing the decision of the County Court Judge), that the bank were entitled to retain their security.

Wilson v. *Lloyd* (1) distinguished.

In a case of composition the Court of Bankruptcy has no jurisdiction to make an order for sale at the instance of an equitable mortgagee of the estate of the debtor.

THIS was an appeal from a decision of the Judge of the *Nantwich* County Court.

Thomas Littler and *James Brotherton Littler* carried on business in partnership as manure manufacturers. On the 12th of December, 1872, they filed a liquidation petition. The first meeting of the joint creditors was held on the 30th of December, when the following resolutions were passed by the proper statutory majority:—

(1). That a composition of 10*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said *T. Littler* and *J. B. Littler*.

(2). That such composition be payable as follows: The sum of 5*s.* in the pound within two months from the registration of the

(1) Law Rep. 16 Eq. 60.

C. J. B. 1874

Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING CO. *In re* LITTLER.

extraordinary resolution, and the further sum of 5*s.* in the pound at the expiration of six months from such registration.

(3). That the security of *George Jones* and *Joseph Lea* be accepted for the second instalment of the said composition.

(4). That the terms of this composition be embodied in a deed to be prepared by Mr. *C. S. Brooke,* solicitor, and approved of on behalf of the said creditors, such deed to contain proper covenants for carrying into effect the foregoing resolutions and for releasing the said debtors.

Among the creditors who signed this resolution were the *Manchester and Liverpool District Banking Company* for £1686 16*s.* 8*d.* They had proved their debt by an affidavit which stated that they held no security for it except the securities which were specified in the schedule thereto. These securities were a guarantee, dated the 18th of June, 1870, by *Thomas Littler* for £300, and a deposit by him, by a memorandum dated the 18th of June, 1870, of the title deeds of the works where the business of the firm was carried on, which were his separate property, and of the mortgage deed of some houses which had been mortgaged to him. At the second meeting of the creditors, held on the 11th of January, 1873, the above resolutions were duly confirmed, and it was also agreed that *Thomas Fowler* and *John Issard* should be accepted as additional sureties for the payment of the composition. Meetings of the separate creditors of both the partners were afterwards held. At the meeting of *J. B. Littler's* creditors the same resolutions were adopted; at the meeting of *Thomas Littler's* creditors it appeared that they had all been paid. The resolutions were registered on the 15th of February, 1873. A deed was prepared in pursuance of the resolutions, and was dated the 20th of March, 1873. This deed was expressed to be made between the debtors of the first part; the several persons and firms (being the creditors of the debtors and the creditors of their separate estates) whose names were subscribed in the schedule, of the second part; and *Thomas Fowler* and *John Issard* (who had been substituted by agreement for the two sureties originally named who had declined to act), as trustees for the creditors, of the third part.

This deed contained a recital that it had been agreed that the

securities held by the bank upon the private estate of *Thomas Littler* should not be prejudicially affected by their assenting to and receiving payment of the composition, and a conveyance by *Thomas Littler* and *J. B. Littler* of the property comprised in the bank's security, and an assignment of all their personal estate, to the trustees to indemnify them against any loss they might sustain by reason of their having guaranteed the payment of the second instalment of the composition. There was also a release of the debtors, conditioned on the payment of the composition, and covenants by them and the trustees to pay it, and there was a declaration that the deed should in nowise prejudice the rights and remedies of the creditors against sureties, or in respect of any collateral securities they might hold. The composition was duly paid to all the creditors, and was accepted by them.

An application was made to the County Court by *Thomas Littler* for an order that the bank should deliver up to him the title deeds of the property comprised in the memorandum of deposit.

Another application was made by the bank for an order declaring them to be equitable mortgagees of the property comprised in the memorandum of deposit, and directing the trustees appointed to carry out the composition, and *Thomas Littler*, and all other necessary parties, to concur in a sale of the property.

There was conflicting evidence as to whether it was stated at the first meeting of the creditors that the bank were to retain their securities, and as to whether *Thomas Littler*, when he executed the deed of the 20th of March, was aware of the provisions contained in it relating to the bank's securities. The Judge was of opinion that the operation of the passing of the resolutions and payment of the composition was to discharge the debtors, and that thereupon their surety, *Thomas Littler*, was also discharged; that the right of action once suspended could not be revived; and that the deed of the 20th of March was inoperative to set up or keep alive the securities given by *Thomas Littler* to the bank. His Honour, therefore, dismissed the application of the bank with costs, and ordered the bank to deliver up the title deeds to *Thomas Littler*, and to pay the costs of his motion. The bank appealed from both orders.

C. J. B.
1874
Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING CO. *In re* LITTLER.

Mr. *Little*, Q.C., and Mr. *Bury*, for the bank:—

We are entitled to retain our security. *Wilson* v. *Lloyd* (1) is distinguishable. *Ex parte Radcliffe Investment Company* (2) is in our favour. It is said to have been established by *Ford* v. *Beech* (3) that a right of action once gone cannot be revived. That this is not so is shewn by *Newington* v. *Levy* (4); *Slater* v. *Jones* (5); *Edwards* v. *Coombe* (6).

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for *Thomas Littler*:—

The Court had no jurisdiction to entertain the application of the bank.

[The CHIEF JUDGE:—So I think. But what do you say as to the rest of the case?]

Independently of the Act, those who agree to accept a composition are bound by it. The bank, if they did not intend to be bound, should have withdrawn their proof and not have voted at all. They have agreed to take 10*s.* in the pound in satisfaction of their debt. It is now said that that means in satisfaction of the balance of their debt after deducting the value of their securities. A creditor is bound to keep the utmost faith with all the other creditors: *Cullingworth* v. *Loyd* (7); *Buck* v. *Shippam* (8). The resolutions ought to have provided that creditors who had security were to retain it. But the ground on which the County Court Judge placed his decision is a good one. When the resolutions were passed the right of action was gone at law, and the subsequent deed could not revive it. *Ford* v. *Beech* is not overruled. *In re Hatton* (9), and the cases cited for the Appellants, were cases in which default had been made in payment of the composition. They do not therefore apply.

SIR JAMES BACON, C.J.:—

This is a very simple case. I cannot tell what jurisdiction the

(1) Law Rep. 16 Eq. 60.
(2) Ibid. 17 Eq. 121.
(3) 11 Q. B. 852.
(4) Law Rep. 5 C. P. 607.
(5) Law Rep. 8 Ex. 186.
(6) Ibid. 7 C. P. 519.
(7) 2 Beav. 385.
(8) 1 Ph. 694.
(9) Law Rep. 7 Ch. 723.

County Court Judge had to make any such order as was asked for by *Thomas Littler's* application. In a composition the estate of the debtors is not meddled with; it does not vest in anybody but the true owners of it. They come calling a meeting of their creditors and making a proposition which is to supersede and to prevent all jurisdiction in simple bankruptcy, and the only jurisdiction the Court has over composition is to see that the resolutions have been regularly passed; to see that they are duly enforced; to correct any errors that there may have been in them, and ultimately to enforce the composition by the Court's own order. That I take to be the limit of the jurisdiction of the Court in matters of composition. Everything that takes place under the composition may, of course, be inquired into and scrutinised to see that it is rightly done. But what power had the County Court Judge to make an order that the bank should deliver to *Thomas Littler* the deeds, upon the ground that the debt for which he had pledged them had been satisfied? I have heard no authority cited—I read nothing in the Act of Parliament—I can conceive nothing in the nature of the case, which could have justified any such application. But since the matter has been gone into at such length, I do not propose to deal with the case only upon that ground, but upon what are called the merits of it. I ought perhaps to go no further than I have done, but I do not think that that would be satisfactory to the parties or respectful to the learned Judge. The case is this: *Thomas Littler* was sole owner of a certain property; being in partnership with another man he deposits the deeds relating to his separate estate with the bank as a security for a joint debt, and for any other debt for which he might be liable to the bank. After that, some time in 1872, the partnership having been dissolved, the firm being unable to discharge its debts in full, a meeting is called—of what? Of the joint creditors. Nothing is said about separate creditors. A meeting is called of the joint creditors, and of the joint creditors alone. And the bank being invited to attend that meeting do attend it. There come the two joint debtors, and *Thomas Littler* especially presents to that meeting, as by the statute he is required to do, a statement of his affairs; and he states: "We owe so much money to such and such people, among others to the bank, and I have deposited" (I do not say that he

C. J. B. 1874

Ex parte MANCHESTER AND LIVERPOOL DISTRICT BANKING CO. *In re* LITTLER.

used these words, but words to this effect) "my title deeds relating to a part of my separate estate with them for the purpose of securing that debt." That is the first step. Next the bank come, and they present what is called their proof, and they state, in the most distinct and explicit terms, what the amount of their debt is, what securities they hold, and from whom they hold them, thereby shewing that their security is not a part of the joint estate which is the subject of consideration at that meeting. Then resolutions are come to, to accept a composition of 10*s.* in the pound upon the joint debts. Resolutions are passed to that effect, by which, in my opinion—not in the least forgetting the decision in *Wilson* v. *Lloyd* (1), to which I have been referred—without any words of reservation the separate security is, by force of the proceeding itself, excluded and reserved. The security held by the bank could not be in the slightest degree affected by any resolution then passed. I do not pause to consider the irregularity which afterwards occurred—the substitution of other sureties at another meeting, and the confirmation which took place; nor the irregular proceeding to call a meeting of the separate creditors which has been referred to. So the matter stood, and it being part of the resolution that a deed to carry into effect the arrangement should be prepared by the person named, how, I ask, could that deed be effectually and properly framed without reserving in terms, as the resolutions did not reserve, the separate security held by the bank? Accordingly a deed is prepared which states the transaction truly and justly, and does reserve to the bank their separate security—a collateral security—no part of that joint estate which is the subject of the deed of composition; no part of the arrangement between the debtors and their joint creditors; and it is done as justly and as fairly and as properly as can be conceived. I am told that there is—I have not heard it read, nor was it necessary that it should be read—evidence to shew that it was stated at the meeting that the bank's security would be retained by them, and evidence to shew that some gentlemen who were present did not hear it. Whichever way that may be, in my opinion it does not affect the merits of the case at all. As I read and understand the resolutions (because there is no kind of analogy between this case and

(1) Law Rep. 16 Eq. 60.

Wilson v. *Lloyd* (1), the transaction is a plain, simple, just matter of business. A creditor with a collateral security says, "I enter into a composition with you as to your joint debt, but I will not relinquish my collateral security." On the footing of that plain announcement the arrangement is carried into effect and the composition paid; and after the composition was paid, *Thomas Littler* bethinks himself that the Judge of the County Court has authority to give him back those deeds which he had pledged under the circumstances which I have mentioned. In my opinion that was wholly improper. There can be no justification of this proceeding on the part of *Thomas Littler* in point of common honesty (if that may be introduced into the case); there can be no justification for it in point of law. That application was wholly wrong; it ought to have been dismissed with costs, and an order dismissing it with costs must now be made. With reference to the bank's application, upon the ground to which I have already adverted, namely, that this Court exercises no jurisdiction over the estate of a compounding creditor, I think that it also was one which the learned Judge had no jurisdiction to entertain, and it also ought to have been dismissed. I suppose, however, that the costs have not been increased by the fact of there being two applications, and I therefore think that the bank's application should have been dismissed without costs. There will be no costs given of either appeal.

Solicitors for the Bank: Messrs. *Milne, Riddle, & Mellor,* agents for Messrs. *Slater, Heelis, & Co., Manchester.*

Solicitor for *Thomas Littler:* Mr. *A. D. Bird,* agent for Mr. *H. C. Lisle, Nantwich.*

(1) Law Rep. 16 Eq. 60.

C. J. B.

1874
April 27.

Ex parte TAYLOR. *In re* MORRISY.

Liquidation—Appointment of Receiver—Refusal of Court to register Resolutions—Jurisdiction to restrain Debtor from suing a Creditor.

19 Ch D 370
371

At the first meeting of the creditors under a liquidation petition, one person, who claimed to be the largest creditor, was ejected by force and not allowed to vote. Resolutions were passed by the other creditors present, but the registration of them was opposed by the excluded creditor, and the Court refused to allow them to be registered. The debtor soon afterwards commenced an action against the excluded creditor for a balance which he alleged to be due to him. At this time no order had been made for the discharge of a receiver, who had been appointed under the petition:—

Held, that there was jurisdiction to restrain the debtor from proceeding with his action.

But the excluded creditor was required to undertake to apply within a fortnight either for an order to call a fresh first meeting of the creditors under the petition, or for an adjudication of bankruptcy against the debtor.

THIS was an appeal from a decision of the Registrar of the *Salford* County Court, acting as Judge.

On the 26th of February, 1873, *Joseph Morrisy*, a builder at *Salford*, entered into a contract with *George Taylor* and *John Taylor* for the conversion of some dwelling-houses into shops at the price of £986. He failed to complete his contract by the time specified, and the Messrs. *Taylor*, in pursuance of a provision in the contract, finished the work themselves.

In January, 1874, *Morrisy* filed a liquidation petition. The first meeting of the creditors was held on the 3rd of February. Before this a receiver of the debtor's property had been appointed. At the meeting Messrs. *Taylor*, though not summoned, attended, and rendered by their proxy a proof for £250 at the least, damages for the breach of the contract. Their proxy was forcibly ejected from the meeting, and was not allowed to vote upon the resolutions which were proposed, *Morrisy* asserting that a balance was in fact due to him from the Messrs. *Taylor* upon the contract. Resolutions in favour of liquidation were carried by the creditors present. The registration of these resolutions was opposed by Messrs. *Taylor*, and on the 11th of February the Judge refused to permit them to be registered, on the ground that Messrs. *Taylor* had not

been allowed to vote, their claim being much the largest one against the estate. No order to discharge the receiver was made.

On the 16th of February *Morrisy* commenced an action at law against the Messrs. *Taylor* to recover the balance which he alleged to be due to him upon the contract. The Messrs. *Taylor* applied to the County Court for an injunction to restrain him from proceeding with the action. The Registrar thought that the proceedings under the petition were at an end by reason of the refusal to register the resolutions, and that there was no jurisdiction to make the order asked for.

Messrs. *Taylor* appealed.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the Appellants:—

Ex parte Jeffery (1) and *Ex parte Jay* (2) shew that, as the receiver has not been discharged, the Court still has jurisdiction in the matter; and *In re England* (3) shews that such an injunction as is asked will be granted. A fresh first meeting of the creditors can be summoned. *Ex parte Cobb* (4) only decides that this cannot be done generally, but the judgment of Lord Justice *James* (5) distinctly implies that it might be done in such a case as the present.

[The CHIEF JUDGE:—How are the proceedings to be renewed? The debtor cannot summon a new meeting.]

Any creditor can apply for an order to do so. At any rate the act of bankruptcy committed by the filing of the petition is available for adjudication for six months.

Mr. *Jordan*, for the debtor:—

Rule 260 of the *Bankruptcy Rules*, 1870, gives power to restrain actions against the debtor, not actions by the debtor. Till the appointment of a trustee the debtor has a right to sue any of his creditors. Even an uncertificated bankrupt had a right to sue unless the assignees interfered: *Herbert* v. *Sayer* (6). The debtor cannot revive the proceedings in this case, and it is clear that no one else will do so.

(1) Law Rep. 9 Ch. 144.
(2) Ibid. 133.
(3) Ibid. 12 Eq. 207.
(4) Law Rep. 8 Ch. 727.
(5) Ibid. 729.
(6) 5 Q. B. 965.

C. J. B. 1874 *Ex parte* TAYLOR. *In re* MORRISY.

SIR JAMES BACON, C.J.:—

A receiver has been appointed under this petition, and no order has been made to discharge him. The debtor has committed an act of bankruptcy which disqualifies him from suing, as it prevents any person who has notice of it from safely paying him. The Messrs. *Taylor*, if they paid the debtor, might have to pay over again. It is impossible that a debtor who has stated that he is insolvent, and has committed an act of bankruptcy, can be permitted to take steps to realise his estate. The Appellants, however, must undertake that they will within a fortnight apply either for an order to summon a fresh first meeting of the creditors under the petition, or for an adjudication of bankruptcy against the debtor. Upon that undertaking being given, I must discharge the order of the Registrar, and grant the injunction asked for.

Solicitors for the Appellants: Messrs. *Hughes & Son*, agents for Messrs. *Vaughan & Son, Manchester.*

Solicitor for the Debtor: Mr. *F. Hampson, Manchester.*

PATTISSON *v.* GILFORD.

M. R.
1874
May 1, 4.

[1874 P. 40.]

Injunction—Threatened Violation of Legal Right—Bill quia timet—Right of Shooting over Estate—Sale of Estate for Building Purposes.

In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the Plaintiff must shew that the act must result in a violation of such right.

The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars shewed that it was intended to make a road through the estate and dedicate it to the public; but gave full notice of the right of shooting:—

Held, that the Court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale.

10 Ch 356
12 Ch D 221
17 Ch D 646
19 Ch D 188
28 Ch D 95
25 Ch D 183
193

IN 1871 the Plaintiff became tenant for a term of twenty-one years (determinable by the Plaintiff at the end of the first seven or fourteen years), under a Mr. *Legh*, of a farm of 480 acres, known as *Kilnwood Farm*, at *Fay Gate*, in *Sussex*, and at the same time Mr. *Legh* agreed by letter to let to the Plaintiff for the same term the right of shooting over an estate known as "*Caryll's*," of about 188 acres, and divided from *Kilnwood* by a turnpike road. The *Caryll's* estate contained valuable coverts, the right to shoot over which was a main inducement to the Plaintiff to take a lease of *Kilnwood Farm*.

Mr. *Legh* had recently sold the *Caryll's* estate to the Defendant, who, towards the end of February, 1874, caused to be inserted in the newspapers a preliminary notice of an intended sale of the estate, in thirteen lots, for building purposes. This notice contained no reference to the Plaintiff's right of shooting.

On the 5th of March the Plaintiff's solicitors wrote to the Defendant, referring to the advertisement, and stating that the proposed sale would render the shooting entirely valueless, and threatening legal proceedings unless the sale were withdrawn, or the property offered to be disposed of in such a way as not to

M. R. 1874 PATTISSON v. GILFORD.

interfere with the Plaintiff's rights. On the 6th of March the Defendant's solicitors wrote a reply, admitting the Plaintiff's right, and stating that it was intended to offer the property subject to it.

The Defendant subsequently issued particulars of sale of the estate in thirteen lots, to take place by auction on the 1st of April, 1874. It was stated in these particulars that the estate comprised "several plots of accommodation and building land delightfully situate and suitable for the erection of villas and residences," and one of the lots was described as "well situated for the erection of a house." It appeared from a plan that it was intended to make a road across the estate; and the particulars contained the following observations:—

"The tenant of the *Kilnwood Farm* (adjoining *Caryll's*) is, during his tenancy, entitled to the shooting (except rabbits) over the whole, or the greater portion, of the lots, and all the lots affected by such right will be sold subject thereto.

"The purchasers of Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 are to maintain and keep in repair the new road about to be made by the vendor and shewn upon the plan hereto annexed, abutting upon each of those lots, until such road shall be dedicated to the public or taken to by the parish, in proportion to the respective frontages of such lots to such road."

The bill was filed on the 27th of March, 1874, alleging, amongst other things, that the Defendant threatened and intended, in order to assist his building speculation, to grub up the hedgerows and plantations and wholly to destroy the coverts on the estate, and praying for an injunction to restrain the Defendant from offering the *Caryll's* estate for sale for building purposes, or for grubbing up the hedgerows or plantations thereon, or from proceeding with the construction of the said intended road, or otherwise dealing with the estate, so as to interfere with or prejudice the due exercise and enjoyment by the Plaintiff of his right of shooting over the same.

Upon an affidavit echoing the bill an *ex parte* order according to the prayer of the bill was made on the 28th of March, the Plaintiff giving the usual undertaking as to damages.

Notice of motion was given for the 15th of April. On that day

the motion was by consent turned into motion for decree, and now came on to be heard.

It appeared by the evidence that the Defendant had staked out the intended road, and had cut through two hedges at places where such road passed through them, but that he had not grubbed up or destroyed any of the plantations or coverts, and had no intention of so doing.

Mr. *Fry*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

It is clear that the intended sale is to be made for building purposes, and if it is carried out the result must necessarily be that the shooting will be utterly destroyed. Even the making of the road will materially damage the Plaintiff's right. But the Plaintiff is not bound to shew damage; he is, in this Court, in the position of a lessee of the shooting with a covenant for quiet enjoyment, and is entitled to enforce the covenant if infringed, without regard to the amount of damage. This doctrine was recognised in the recent case of *Leech* v. *Schweder* (1), though the Appeal Court differed from your Honour as to what was included in the covenant.

Under these circumstances the Plaintiff may file his bill at once against the Defendant, and is not bound to wait till the purchase is completed, and then file bills against the thirteen purchasers.

Mr. *Southgate*, Q.C., and Mr. *North*, for the Defendant, were not called upon.

SIR G. JESSEL, M.R.:—

I do not think I can give the relief that the Plaintiff asks. I have a strong notion that the Defendant would have done something wrong if the Plaintiff had not written him a letter, but the answer to the letter was, "Look at my particulars of sale;" and I must look at them. The Plaintiff in substance claims a right of shooting over some land with a covenant for quiet enjoyment, not actually under a demise, but under an agreement by letter, which in this Court amounts to a demise. He now comes for an injunc-

(1) Law Rep. 9 Ch. 463.

M. R. 1874 PATTISSON v. GILFORD.

tion in effect, though not in terms, to restrain the Defendant from interfering with this right. I granted an interim injunction on an assertion in an affidavit that the Defendant was going to grub up and destroy the plantations, and if that had been proved, I should have continued the order. But the facts now established are wholly different. All the destruction that the Defendant has committed is limited to this—that he has made a small road across the estate, and in making it has cut through two hedges; and it is not now pretended that that will interfere with the shooting in any way. What the Defendant is actually doing is this—he is putting up the property for sale in thirteen lots, under particulars of sale which state that it comprises "several plots of accommodation and building land delightfully situate and suitable for the erection of villas and residences." Then, under the title "Observations," there comes this:—[His Honour read the sentences set out above.]

It appears that the Defendant has staked out a road and taken down the hedges so as to enable it to be made, and it is clear that it is intended to be dedicated to the public. But the particulars do not contain any representation as to any particular portion of the estate being building ground; and, in fact, the Defendant, having received the Plaintiff's letter, has, no doubt, carefully abstained from representing that any part of the land is immediately available for building purposes. If a man sells land in that way, telling the purchaser that during his tenancy another person has the right of shooting, and if it turns out that the land cannot be built on without interference with the right of shooting, he in effect tells the purchaser this: "Recollect, you must make some arrangement with the person holding the right of shooting before you can build. All I say is, that the property is well situated for building, admirably situated for the erection of a house, only before you erect your house you must either get the leave of the person entitled to the right of shooting, or wait till the expiration of the lease of the shooting." There is no representation to the purchaser that he can immediately proceed to build irrespective of that right.

Now, what are the principles upon which this Court interferes? I take it that, in order to obtain an injunction, a Plaintiff, who complains, not that an act is an actual violation of his right, but

that a threatened or intended act, if carried into effect, will be a violation of the right, must shew that such will be an inevitable result. It will not do to say a violation of the right may be the result: the Plaintiff must shew that a violation will be the inevitable result. On that point there are some well-known authorities. The case usually cited is a decision of Lord *Cottenham*, *Haines* v. *Taylor* (1), and there it was laid down that if the act threatened to be done could by any possibility be done in such a way as not to prejudice the right, it would not be restrained, and that it was not sufficient to say that it probably would prejudice the right. In that case it is said, "The Court refuses the motion, not because it has formed an opinion as to the legality of what it is alleged that the Defendants are about to do, but simply because the Plaintiff has not brought before it circumstances which enable it to interfere between the parties." The principle is this: If you say the Defendant is going to do an unlawful act, you must prove that it is necessarily unlawful; it is not enough to say it may be unlawful. Again, in the case of the *Emperor of Austria* v. *Day* (2), the Lord Chancellor says: "I consider this Court has jurisdiction by injunction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but if the party applying is free from blame and promptly applies for relief, and shews that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted." Then, in *Tipping* v. *Eckersley* (3), which I hold to be good law, it is laid down, that if there is an express covenant, such as a covenant for quiet enjoyment, then damage is not necessarily to be shewn, it is sufficient to shew that there is a breach of the express covenant; but at all events, you must shew that there is a breach. All these observations would apply if the Defendant were actually threatening to erect villas. It does not by any means follow as of necessity that the erection of one or two villas will injure the right of shooting; that depends upon the part of the estate on which the villas are built, the number of villas, and the size of them, and so on. There may or may not be

(1) 2 Ph. 209, 210. (2) 3 D. F. & J. 217, 240.
(3) 2 K. & J. 264.

M. R. 1874 PATTISSON v. GILFORD.

injury, and I should hesitate long before I granted an injunction against a Defendant, over whose estate there existed a right of shooting, to prevent his building a single house. Of course a great deal would depend on the extent of the property, and the nature of the coverts, and so on; but I should require to be satisfied, according to the authorities, that by the erection of a house, or even two houses if the estate was a large one, injury must necessarily and inevitably follow. When I say inevitably, I do not use the word in the sense of there being no possibility the other way, because I think Courts of justice must always act upon the theory of very great probability being sufficient;—all I mean is that there must be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow. But in this case the Defendant is not going to do anything of the kind; all he is going to do is what he has an undoubted right to do, to sell the estate. He may sell it in several lots, or in one lot, as he thinks fit; and he may tell the purchaser anything he likes in praise of the estate—that it is beautifully situate, that it is well adapted for building. He must not tell the purchaser, "You may build upon it forthwith, you will not injure the right of shooting;" but he does not do that; all he says is, "There are some plots" (one of which is particularly pointed out) "very eligible for building purposes; but recollect, there is a right of shooting over all the plots, and you take subject to that right, and you must be careful not to make such an erection as will interfere with this right of shooting." That is the effect of the particulars. No cautious man who understood the particulars would buy that land for immediate building purposes; he would see the difficulty which he would get into with regard to the owner of the right of shooting. Then it is said, What is the owner of the right of shooting to do if you cut up an estate in a great number of lots? Is he to sue the owner of each lot? That is his misfortune. He has no contract with the landlord not to sell his estate in lots. If it was desirable not to accept a grant of the right of shooting except on those terms, he should have stipulated for them. I know of nothing that prevents a landlord who has granted the right of shooting over his estate from afterwards selling his estate in lots. You may have fifty

M. R.
1874
PATTISSON.
v.
GILFORD.

lots or 500 lots. It might be very inconvenient for the owner of the right of shooting if he had to sue a great many parties and bring a great many actions; but still I take it his right of shooting is not necessarily interfered with by the mere division of the estate in lots. Then, is it interfered with by the purchasers of the lots being told, "Some of the lots are very well situate for building;" when they are told at the same time, "It is subject to the right of shooting?" I cannot hold that it is. The mere telling them what is the fact, that these are eligible building sites, though not immediately available on account of the right of shooting, is not an interference with the right of shooting. Altogether, I cannot see how the Plaintiff has a right to come to this Court for relief under these circumstances. I shall dismiss the bill, and the costs must follow the result.

Mr. *Southgate* asked for an inquiry as to damages.

SIR G. JESSEL, M.R.:—Yes; I think you are entitled to that.

Solicitors: Messrs. *Nickinson, Prall, & Nickinson;* Messrs. *Ashurst, Morris, & Co.*

JONES *v.* LLOYD.

M. R.
1874
May 4.

[1874 J. 39.]

Practice—Pleading—Suit by Person of Unsound Mind not found so by Inquisition—Next Friend—Dissolution of Partnership—Notice to dissolve—Withdrawal of Notice.

A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner.

Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner.

A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of the Plaintiff, alleging that the Plaintiff had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the

M. R.

1874

JONES
v.
LLOYD.

partnership might be dissolved and accounts taken, and the share of the Plaintiff in the assets secured for his benefit, and for a receiver :—

Held, on demurrer, that the suit could be maintained.

Whether a decree for final dissolution can be made in such a suit without the appointment of a committee in lunacy, *quære*.

The jurisdiction of the Court of Chancery with respect to suits instituted by persons of unsound mind, not so found by inquisition, by next friends, considered.

The articles of partnership between the Plaintiff and Defendant provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. The Plaintiff having become insane, the Defendant served on him notice of his intention to determine the partnership at the end of the first seven years of the term :—

Held, that the notice could not be withdrawn without the consent of the Plaintiff.

DEMURRER.

The bill was filed by *Joseph Jones*, described as a person of unsound mind not so found by inquisition, by *Edward Brettell*, his next friend, against *Lewis Lloyd*, and contained allegations to the following effect :—

In April, 1867, the Plaintiff and Defendant entered into partnership as chain-cable, anchor, and nail manufacturers, at *Cradley*, in *Worcestershire*, for a term of fourteen years from the 31st of March then last. The articles of partnership provided, that at the end or determination of the first seven years of the term, or if either partner should without the consent of the other do any of the wrongful acts therein enumerated (none of which the Defendant was alleged to have done), then in the first case it should be lawful for either partner, and in any of the other cases it should be lawful for the other partner, by giving notice in writing to the partner so offending, or leaving the same for him at the counting-house of the partnership for the time being, to determine the partnership from the time when such notice should be given or left. And then and in such case the share and interest of such offending partner of and in the effects belonging to the partnership should be ascertained, and he should have such an allowance in lieu of profits, in addition to the interest on his share of the capital, and the amount thereof respectively should be paid, and such instruments should be executed in relation to his share and interest, as if he had died on the day of such determination.

The business was carried on by the Plaintiff and Defendant in accordance with the articles of partnership, until about three years before the filing of the bill, when (according to the 6th paragraph of the bill) the health of the Plaintiff failed, and, owing to softening of the brain, he became, and had ever since continued, incapable of attending to business, and was then in fact of unsound mind.

On the 17th of September, 1873, the Defendant gave written notice to the Plaintiff of his intention to dissolve the partnership on the 31st of March, 1874, when the first seven years thereof would expire. Various differences arose between the Defendant on the one hand and the family and advisers of the Plaintiff on the other, in taking the partnership accounts, and on the 28th of March, 1874, the Defendant served on the Plaintiff the following notice:—

"To Mr. *Joseph Jones*, of *Cradley, Worcestershire*, chain and nail manufacturer. I hereby withdraw and abandon the notice, dated the 17th day of September, 1873, served by me upon you of my intention to dissolve our partnership on the 31st day of March, 1874, under our articles of partnership dated the 15th day of April, 1867."

The 14th paragraph of the bill alleged that the Plaintiff was of unsound mind at the date of the service of the above-mentioned notice, and that it was expedient and for the benefit of the Plaintiff that the partnership should be dissolved.

The bill prayed that the partnership might be declared to be dissolved from the 31st of March, 1874, that an account of the partnership transactions might be taken, and that what upon taking such account should appear to be due to the Plaintiff from the Defendant might be decreed to be paid to or secured for the benefit of the Plaintiff, the Plaintiff thereby offering to pay what, if anything, should be found due from him to the Defendant; that the property of the partnership might be sold under the direction of the Court, and the produce thereof paid to or secured for the benefit of the Plaintiff and Defendant, according to their respective rights and interests therein; and for a receiver.

The Defendant demurred.

M. R. 1874 JONES v. LLOYD.

Mr. *Fischer*, Q.C., and Mr. *Maidlow*, for the demurrer :—

As a general rule, no doubt, notice of dissolution given to a lunatic partner operates as a dissolution of the partnership : *Robertson* v. *Lockie* (1), *Mellersh* v. *Keen* (2); but in this instance the notice was irregular, as it was not given at the end or determination of the first seven years of the term, so the Defendant was at liberty to withdraw it.

There being then no actual dissolution of the partnership, the question is, whether the Plaintiff is entitled to come to this Court to have it dissolved. Permanent insanity (which is not alleged to exist here) is a ground for a decree for dissolution at the suit of the other partner, because of the insane partner's incapacity to conduct the business according to the terms of the partnership : *Sayer* v. *Bennet* (3); *Waters* v. *Taylor* (4); *Jones* v. *Noy* (5); *Anonymous* (6); but it has not been decided that the insane partner has any right to have the partnership dissolved on the ground of his own incapacity, when the other partner is able and willing to perform his part of the partnership contract. At all events, he is not entitled to maintain a suit by a next friend with that object.

[Mr. *Southgate*, Q.C., referred to *Fisher* v. *Melles* (7).]

(1) 15 Sim. 285.
(2) 27 Beav. 236.
(3) *Montagu's* Digest of the Law of Partnership, note (c); S. C. 1 Cox, 107.
(4) 2 V. & B. 299.
(5) 2 My. & K. 125.
(6) 2 K. & J. 441.
(7) M.R. 1870. Mar. 10, 14; June 30.

[1870 F. 3.]

FISHER *v.* MELLES.

MOTION for decree.

The bill was filed by *Joseph Charles Fisher*, described as a person of weak mind, by *William Jones*, his father-in-law and next friend, against *William Melles*, *Henry Roberts*, *Henry Jones*, and *John Reid*. It alleged in effect that the Plaintiff was, and for eighteen months past had been, afflicted with softening of the brain, and in consequence thereof was of weak mind, and his judgment and capacity of understanding ordinary matters had been so weakened and destroyed as to render him unfit to attend to business of importance, or to take part in transactions requiring ordinary intelligence; that *Melles* had acquired great and undue influence, amounting, in fact, to absolute control over the Plaintiff, and taking advantage of his weakness of mind, had induced him to execute a deed, intended to have the effect of dissolving the partnership between him and *Melles* (which partnership was constituted by articles dated in June, 1856, for a term expiring on the 24th of June, 1870), and constituting a new partnership between the Plaintiff and the Defendants other than *Melles*, who

affected to retire in favour of such other Defendants, the share and interest of the Plaintiff being considerably reduced by the provisions of such deed; and that the same Defendants were at the date of the pretended dissolution well aware that the Plaintiff was in such a state of mind and body as to be unable to enter into any contract; yet they, being desirous of procuring the business for their own benefit, without regard to the rights and interest of the Plaintiff, arranged with *Melles* all the terms of his pretended retirement and of the pretended new partnership, and agreed with him that he should procure the same to be embodied in a deed, and should induce the Plaintiff to execute the same.

The bill prayed that it might be declared that the deed of dissolution of partnership and the document constituting the alleged new partnership were improperly obtained from the Plaintiff, and were respectively void and of no effect, and that the partnership between the Plaintiff and *Melles* was a continuing partnership until the 24th of June then next; and that some proper person might be appointed to manage the business, and that upon the expiration of the partnership the business might be sold; that *Melles* might be restrained from intermeddling with the property of the partnership and from injuring or using the name of *Fisher* and *Melles*, and that the other Defendants might be restrained from doing any act in the name of the alleged new partnership, and from continuing in possession of the warehouse, books, and property of *Fisher* and *Melles*, and might be ordered to deliver up possession thereof; and for consequential accounts.

Mr. *Jessel*, Q.C., and Mr. *Stock*, for the Plaintiff.

Mr. *Southgate*, Q.C., and Mr. *Bush*, for the Defendants.

March 14. LORD ROMILLY, M.R., made the following order:—

"His Lordship being of opinion that no case is established against the Defendants of undue influence or fraud against the Plaintiff, and that the costs of so much of the bill as charges undue influence or fraud ought ultimately to be paid by the next friend of the Plaintiff, doth order that the motion do stand over, to enable an application to be made to the Lords Justices of Appeal to establish the fact that the Plaintiff is a person of such unsound mind as to be incapable of taking care of himself or his property; and any of the parties are to be at liberty to apply as they may be advised."

The Plaintiff was subsequently found lunatic by inquisition. The suit was continued by the next friend as committee, and on the 30th of June, 1870, Lord *Romilly*, M.R., dismissed so much of the bill as charged undue influence or fraud, with costs to be paid by the committee, and made a declaration that at the time of entering into the alleged new partnership the Plaintiff was not in a fit state of mind to enter into it, and that the same was void, and directed the accounts to be taken of the partnership of *Fisher* and *Melles*.

Solicitors: Mr. *W. Compton Smith*; Mr. *Roberts*.

The proper course would have been to have the Plaintiff found lunatic by inquisition, and then to apply in lunacy under sect. 123 of the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), for a

M. R. 1874 JONES v. LLOYD.

dissolution of the partnership. Unsoundness of mind gives this Court no jurisdiction whatever. The Plaintiff may recover his reason, or he may be found lunatic by inquisition; and in either event the suit will be paralysed: *Beall* v. *Smith* (1). *Light* v. *Light* (2), which will be cited on the other side as an authority for a suit instituted in the name of a person of weak mind by a next friend, is in our favour; for the Master of the Rolls, though he made a decree for the protection of the Plaintiff's property, yet admitted the force of the objections to the suit, and gave liberty to apply in lunacy as to the application of the property. In *Halfhide* v. *Robinson* (3), the Lords Justices held that a bill cannot be filed by a next friend, on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate.

Mr. *Southgate*, Q.C., and Mr. *E. W. Byrne*, for the bill, were not called on.

SIR G. JESSEL, M.R.:—

This bill raises two questions, one of them of very considerable importance as regards general law, and the other only of importance between the parties. The second of these questions, which I must deal with first, is, whether under the terms of this particular agreement of partnership the partnership has been actually dissolved by reason of a notice given by the Defendant. The other question is, whether, if the partnership has not been actually dissolved, the Plaintiff, a person of unsound mind not found so by inquisition, is entitled by a suit instituted by a next friend to have it declared to be so. This question branches out into several, which have been argued before me. One question is, whether, if so entitled at all, which is disputed, the Plaintiff must not shew permanent insanity; and it is said there is no sufficient allegation of permanent insanity. Another is, that the Plaintiff can only be so entitled if the Court should be satisfied that the partnership will be dissolved in the interests of the lunatic, and there is no allegation to maintain that; and then it is said that in any event no

(1) Law Rep. 9 Ch. 85. (2) 25 Beav. 248.
(3) Law Rep. 9 Ch. 373.

decree ought to be made at the instance of a person in this position, because it cannot be worked out against the Defendant.

Now, the first point is, has the partnership been dissolved independently of the lunacy? That depends upon the construction of the articles of partnership. [His Honour referred to the provision for dissolution stated above, and after deciding that the meaning of the articles was, that either partner should be at liberty to give notice a reasonable time before of his intention to dissolve the partnership at the end of the first seven years of the term, and that the partnership was dissolved by the notice of the 17th of September, continued:—] Then comes the question, whether on the 28th of March the service of the notice of the Defendant's determination to withdraw the former notice could alter the position of the parties? I am clear that it could not. In the first place, it is perfectly well settled that, the first notice being served, if a valid notice, took effect, whether the Plaintiff was sane or insane. That has been decided a great many times. *Mellersh* v. *Keen* (1) was, I think, the last case. Therefore, the first notice would be perfectly valid, though the Plaintiff was insane at the time. But how could the second notice be good for anything? If the first notice put an end to the partnership, it altered the position of the parties; and how could a man without the consent of the other party say, I will become a partner again? It is totally impossible that, after a notice of that kind has been given, one party alone could withdraw it without the consent of the other and enter into a partnership again. In my opinion, there is no such power of withdrawal as is claimed by the Defendant; and if the first notice were valid, that notice remains unaffected by the attempt to withdraw it.

If that is the right view, there is an actual dissolution of the partnership, and the Plaintiff would become entitled to come here under the ordinary jurisdiction to protect the partnership property and to have a receiver and manager appointed.

But there is another ground upon which the bill is framed which I must advert to. The bill is framed also on the ground that in any event the insanity of the Plaintiff entitles him by his next friend to have it declared that it is beneficial for him to put an end

(1) 27 Beav. 236.

M. R. 1874 JONES v. LLOYD.

to the partnership, or to have that partnership put an end to. I think that such a bill can be filed, and is within the authorities. First of all, I quite agree with what was said on the part of the Defendant, that you must have an allegation of permanent insanity —that is, that you must have an allegation of insanity, not merely of a temporary character, for that is the meaning of the rule, and not merely insanity from which it is likely or reasonably possible that a man may recover. Well, I think that is sufficiently alleged here. I do not think that anybody understanding the meaning of language, and having even that slight acquaintance with medical knowledge which every person of ordinarily good education is expected to have, could doubt that the allegation in the sixth paragraph of the bill is an allegation of permanent insanity, and not merely of temporary lunacy, from which a man is likely to recover.

Then it was said, "Even that being so, it by no means follows that the Court will dissolve a partnership at the instance of a person of unsound mind not so found by inquisition, at the request of a next friend, for really he is the person asking it, and not the lunatic." To that proposition I also give my cordial assent. I think no Court would dissolve a partnership unless it saw it was necessary for the benefit of the lunatic. If it saw it would be for his benefit that the partnership should be continued, as being well managed and the property well taken care of, the Court would not interfere. But I find in this bill an allegation in the fourteenth paragraph "that it is expedient and for the benefit of the Plaintiff that the said partnership should be dissolved, and the accounts thereof taken by and under the direction of the Court;" and I find that followed by a prayer that the property of the partnership, that is, the assets, may be decreed to be paid to or secured for the benefit of the Plaintiff, the Plaintiff being ready and willing and thereby offering to pay what, if anything, shall be found due to the Defendant; that all the property, stock-in-trade, and effects of the said partnership may be got in and disposed of under the direction of the Court; that a proper person may be appointed to receive and collect the debts, moneys, stock-in-trade, and effects owing and belonging to the said partnership; and that all proper directions may be given for effectuating the purposes aforesaid. So that I find an allegation that it is for the benefit of the Plaintiff, and I

find a prayer for what I will call an interim security for the partnership property—I mean the appointment of a receiver, and so on. Can I say, therefore, on general demurrer, which admits all these facts, that it is not to be dissolved at the instance of the Plaintiff? I cannot say so, unless it is true that the insane partner has no equity, which was the proposition maintained by one, if not by both, of the counsel for the Defendant.

Well, now, that is a proposition of law which it is necessary to examine, and at the same time I will state another proposition which they put forward, and which can be examined conveniently at the same time. It was said that, even assuming there was such an equity, the equity can only be asserted by the committee in lunacy, and cannot be asserted by a bill filed by a next friend. I do not think either of those propositions well founded. I think there is an equity on the part of the lunatic, and I think the equity may be asserted by the next friend. I do not say that it is not desirable that there should be a committee appointed, and I do not say, if this case comes to a hearing, I myself, if I am then the Judge to hear it, or the Court which may hear it, may not think it desirable that it should not be finally adjudicated upon until some application has been made to the Lords Justices for an adjudication in lunacy and for the appointment of a committee. All that is matter for subsequent consideration. What I have now to decide is, whether the bill itself is maintainable, and whether any interim order for the protection of the property of the lunatic or his share of the partnership property can or cannot be obtained.

On the first point, I think that the old decision of Lord *Kenyon* is, as adopted and recognised by Lord *Eldon* and Vice-Chancellor *Wood* in subsequent cases, quite conclusive. What Lord *Kenyon* said in *Sayer* v. *Bennet* (1) was: "This I will venture to lay down as a general rule: that where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground for putting an end to the partnership; not by the authority of either of the partners, but by an application to a Court of Justice, and this for the sake of the partner who is rendered incapable, as well

(1) *Montagu's* Digest of the Law of Partnership, note (*c*); S. C. 1 Cox, 107.

M. R. 1874 JONES v. LLOYD.

as of the other; for it would be a great hardship upon a person so disordered if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. If this, then, were a case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership." Now, that means as clearly as possible that there is an equity for the insane partner. The bargain he made was, that certain property called partnership property should be under the joint control of himself and another—not that it should be under the sole control of the other—and that he and the other should take an active part in carrying on the business and in supervising the arrangements necessary for carrying it on, and that the partnership property should not be risked by the other without his consent. That was his bargain. By the act of God that bargain has become incapable of performance, and he is not able to exercise that supervision over the conduct of the business and the care of the property for which he bargained. Then what I understand Lord *Kenyon* to mean is, that that has so altered the complexion of matters, has so entirely changed the nature of the contract, that he is no longer bound, and that, even on the part of the lunatic, you may apply to a Court of Equity, in a proper case, for a dissolution, on the ground of that entire change having taken place in the relations between the parties, and that the equity is not confined to the sane partner, but it is clearly extensible and extended to the case of the lunatic partner. I find the whole doctrine, the whole judgment of Lord *Kenyon*, approved by Lord *Eldon* in *Waters* v. *Taylor* (1), and equally approved by Vice-Chancellor *Wood* in the *Anonymous* case (2). Therefore, I take it to be settled law—and when I say I take it to be settled law, I am using the very words that were used by the Vice-Chancellor—that the insane partner has a right to come into this Court, of course in a proper case, to have the partnership dissolved.

That, then, being his right, can it be exercised? that is, can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no

(1) 2 V. & B. 299. (2) 2 K. & J. 441.

occasion really to refer to the reason, for I think the cases of *Light* v. *Light* (1) and *Beall* v. *Smith* (2) are such authorities; but independently of the unreported case of *Fisher* v. *Melles*, where I know the point was discussed, and independently of authority, let us look at the reason of the thing. If this were not the law, anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the Lords Justices or the Lord Chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition, and his family sometimes hesitate about making him a lunatic, or hope for his recovery, and take care of him in the meantime without applying for a commission in lunacy. Is it to be tolerated that any person can injure him or his property without there being any power in any Court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as a next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this Court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he cannot maintain such a suit. Of course they do not answer the question as to how far he may carry it; but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever. But how stands it on authority? In the case of *Light* v. *Light*, the exact point came before my predecessor, and he decided that in a case of trust such a bill could be filed by a lunatic not so found by inquisition, by his next friend. I find in the books of practice the proposition so laid down in the widest sense. But the question came

(1) 25 Beav. 248. (2) Law Rep. 9 Ch. 85.

M. R. 1874 — JONES v. LLOYD.

before the Lords Justices recently in the case of *Beall* v. *Smith* (1), which was cited to me by the Defendant's counsel, and what do they say? Lord Justice *James* says this: "The law of the Court of Chancery undoubtedly is, that in certain cases, where there is a person of unsound mind not found so by inquisition, and therefore incapable of invoking the protection of the Court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. But every person so constituting himself officiously the guardian, committee, and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question." Well, here I find an allegation which is to be taken as true on this demurrer, that the bill is for the benefit of the lunatic, and therefore the next friend has so far discharged himself from that *onus*. Then he goes on: "The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. . . . The Court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind. If there be a trust property in which the person is beneficially interested, the Court may, no doubt, deal with it in such manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorize, and in a proper case compel, the trustee to deal with the lunatic's interest in the trust property for his benefit. But that arises from its inherent absolute jurisdiction over trusts and trust funds. So in a case of partnership, it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of a partner; but that again is a consequence of its ordinary jurisdiction in partnership matters, which is not ousted or paralyzed by such incompetency." Now no one can deny, I should think, after that judgment, that in partnership matters, in which this Court has a primary jurisdiction, that jurisdiction is not ousted or destroyed

(1) Law Rep. 9 Ch. 91.

by either party becoming a lunatic. It is impossible to doubt, at least I should think so, that if one partner was misapplying the assets, the other partner, though a lunatic not found so by inquisition, could by his next friend prevent such misapplication. So in the same way, if it be as Lord *Kenyon* puts it, an undoubted hardship on the lunatic that his property should be left at the mercy of his partner, or the whole mode of conducting the business left to the sole discretion of his partner, and that hardship was remediable in a Court of Equity prior to the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), the same remedy must still remain, and the lunatic must have an undoubted right to say, "This is a case in which it will be for my benefit that the partnership should be dissolved, and therefore I am entitled to some protection for the assets, even before the decree for final dissolution." And he is entitled to submit that case to the judgment of the Court, and for that purpose, at all events, to make the necessary application. I do not say—it is not necessary for me to say at the present moment—whether he will or will not obtain a final decree without application to the jurisdiction in lunacy; all I say is, that in my opinion and judgment he can maintain this bill, and this being a general demurrer for want of equity, it must be overruled.

Solicitors: Messrs. *Church, Sons, & Clarke;* Mr. *E. Byrne,* agent for Messrs. *Homfray & Holberton, Brierley Hill.*

V.-C. M.
1874
April 29.

In re SEWART'S ESTATE.

Lands Clauses Act—Investment on Real Security—Costs of subsequent Investment.

It is not now the practice to introduce into an order for the investment of money paid into Court under the *Lands Clauses Consolidation Act* upon real security, a direction that the company paying the money into Court are not to be required to pay the costs of a subsequent investment in land.

THIS was a Petition by the tenant for life of certain property, part of which had been taken by the *Metropolitan Railway Company* under one of their Acts, praying for the investment of the purchase-money of the land taken, which had been paid into Court under the 69th section of the *Lands Clauses Consolidation Act*, on mortgage of the estate of which he was tenant for life.

There had been no previous application for the investment of these funds.

Mr. *Speed*, for the Petitioner:—

This mode of investment has been allowed in other cases: *In re Flemon's Trusts* (1).

Mr. *Badcock*, for other parties interested in the estate, concurred in the application.

Mr. *Farwell*, for the company:—

If the order is made it must be subject to the direction made in *In re Flemon's Trusts*, that the company are not to be compelled to pay the costs of any future investment in land. That case only followed the practice which was settled previously in *In re Lomax* (2).

Mr. *Speed*:—

Those cases, so far as they tended to establish such a rule, are now superseded by the decision of Lord *Selborne*, sitting for the Master of the Rolls, in *In re Blyth's Trusts* (3).

(1) Law Rep. 10 Eq. 612. (2) 34 Beav. 294.
(3) Law Rep. 16 Eq. 468.

SIR R. MALINS, V.C.:— V.-C. M. 1874 In re SEWART'S ESTATE.

I consider myself bound to follow the decision of Lord *Selborne*, but independently of that, I consider *In re Blyth's Trusts* (1) perfectly right. The order will be made without any such direction as that asked for on the part of the company.

Solicitors: Mr. *Raw*; Messrs. *Vizard, Crowder, & Anstie*; Messrs. *Burchell*.

In re SPURSTOWE'S CHARITY. V.-C. M. 1874 May 1.

Payment out of Court—Lands Clauses Act—Charity—Trustees—Persons absolutely Entitled.

A fund in Court, paid in under the *Lands Clauses Consolidation Act*, as the price of charity land, may be paid out to the trustees of the charity, as being persons absolutely entitled thereto.

THIS was a Petition asking for payment out of Court to the trustees of a charity, called *Spurstowe's Charity*, of a fund which had been paid in under the *Lands Clauses Consolidation Act* by the *Great Eastern Railway Company*, as the purchase-money of certain land taken by them and belonging to the charity.

A petition had been some time previously presented, asking that the dividends might be accumulated.

It appeared that there was already a sum of money belonging to the charity standing in the names of the trustees, and it was proposed to add the fund now in Court to the same sum of money.

Mr. *Chute*, for the Petitioners:—

Trustees of a charity are persons absolutely entitled under the *Lands Clauses Consolidation Act: Ex parte Trustees of Tid St. Giles Charity* (2).

Mr. *Jason Smith*, for the company:—

The Court is not disposed to do more than order the dividends to be paid to the trustees of the charity: *In re Reaston's Estate* (3);

(1) Law Rep. 16 Eq. 468. (2) 17 W. R. 758.

(3) Law Rep. 13 Eq. 564.

V.-C. M. 1874 *In re* SPURSTOWE'S CHARITY.

especially considering the disabilities imposed upon charity trustees by the *Charitable Trusts Amendment Act*, 1855 (18 & 19 Vict. c. 124).

SIR R. MALINS, V.C.:—

I will make the order as prayed by the Petitioners.

Solicitors: Messrs. *Randall & Son;* Mr. *Shaw.*

V.-C. M. 1874 *June* 12.

In re CLERGY ORPHAN CORPORATION.

Investment—Cash under the Control of the Court—Change of Investment—Metropolitan Consolidated Stock—23 & 24 Vict. c. 38, *s.* 11.

Stock in the funds belonging to a charity incorporated by Act of Parliament, and having power to invest in the public funds, may, under sect. 11 of the statute of 23 & 24 Vict. c. 38, be sold out for the purpose of re-investment on any of the stocks, funds, and securities on which cash under the control of the Court may be invested.

Such funds may also be sold out and re-invested on Metropolitan Consolidated Stock under the *Metropolitan Board of Works Loans Act*, 1871.

THE *Clergy Orphan Corporation* were incorporated by an Act of 49 Geo. 3, c. 18, by the name of *The Governors of the Society for Clothing, Maintaning, and Educating poor Orphans of Clergymen of the Established Church in that part of the United Kingdom of Great Britain called England until of age to be put Apprentice:* and by sect. 3 they were empowered "to have, hold, receive, enjoy, possess, and retain for the ends and purposes of that Act, and in trust for and for the benefit of the society all such sum and sums of money as had been paid, given, devised, or bequeathed, or should at any time or times thereafter be paid, given, devised, or bequeathed by any charitable and well-disposed person or persons to and for the charitable ends and purposes in that Act mentioned, and at any time thereafter, without license in mortmain, to purchase, take, or receive, hold, and enjoy any lands, tenements, or hereditaments for the purposes of the charity"; and provision was made for vesting in the corporation the existing funds of the society; and by the 4th section of the Act it was enacted as follows: "That it shall be lawful for the treasurer for the time being of the said corporation, and he is hereby authorized and required

from time to time, by and with the consent and approbation of the committee thereof for the time being, or the major part of such committee present at any of their meetings, to lay out and invest all or any such sum or sums of money as have or hath been given, devised, or bequeathed, or shall at any time or times hereafter be paid, given, devised, or bequeathed by any charitable or well-disposed person or persons to and for the charitable ends, intents, and purposes in this Act mentioned, or any part thereof, in any of the public funds in the name of the said corporation, other than and except such and so much thereof as shall be requisite for immediate exigencies and expenditures;" and the 5th section of the Act provided for the application of the income to arise from the funds and securities belonging, or which should at any time belong, to the said corporation, to and for the uses and purposes in the Act mentioned.

A considerable sum of money had been received by the society by gift, devise, or bequest, and had been invested in £3 per Cent. Bank Annuities; and it was now desired to substitute for the existing investments some or one of the stocks, funds, or securities on which, by the General Order of the 1st of February, 1861, cash under the control of the Court may be invested by means of sect. 11 of the Act of 23 & 24 Vict. c. 38, or (under the provisions of the Act of 34 & 35 Vict. c. 47, s. 13) in Metropolitan Consolidated Stock.

The extended power of investment as regarded additional funds coming to the corporation was not doubted, but a difficulty was felt as to varying existing investments.

The governors of the corporation accordingly presented the present Petition, seeking the advice and direction of the Court as to whether funds already invested could be sold for the purpose of re-investment.

Mr. *Cozens-Hardy*, for the Petitioners:—

No question is asked as to the power under sect. 11 of 23 & 24 Vict. c. 38, to invest in the manner desired any funds to be hereafter acquired by the society, but the decision in *In re Warde* (1) has caused a question to be raised as to the powers of the trustees to sell out funds already invested, with a view to re-investment,

(1) 2 J. & H. 191.

V.-C. M. 1874 *In re* Clergy Orphan Corporation.

where there is no express power of varying existing securities. A distinction may, however, be drawn between that case and the present, on the ground that it was a settlement of a specific fund, while here there is a general power of investing all moneys belonging to the charity in any of the public funds.

Sir R. Malins, V.C.:—

I consider that the intention of sect. 11 of the Act of 23 & 24 Vict. c. 38, was to enlarge the powers of investment previously belonging to trustees by allowing them to invest any fund in their hands on the stocks, funds, and securities from time to time sanctioned by the Court; and my opinion is, that the Petitioners being trustees, and having funds directed by their Act of Parliament to be invested in the public funds, come within the enabling clause, and that consequently all the funds of this charity, whether invested or not, may be dealt with as cash under the control of the Court. I do not say that the decision in *In re Warde* (1) was not right, but though I do not see very clearly the grounds of that decision, it must, I think, be treated as depending upon its special circumstances. I consider, therefore, that the Petitioners may sell out the existing stock with a view to re-investment; and I shall therefore answer the question in the affirmative.

Mr. *Cozens-Hardy*:—

Then there is the further question, whether the Metropolitan Consolidated Stock is within the powers of investment. Sect. 13 of the *Metropolitan Board of Works Loans Act*, 1871 (34 & 35 Vict. c. 47) (2), seems to give full authority to the corporation to select this stock as an investment.

Sir R. Malins, V.C.:—

That section seems wide enough to include the present charity. The Petitioners will therefore be allowed to invest in that stock. The costs of the application will be out of the fund.

Solicitors: Messrs. *Chapple & Welch.*

(1) 2 J. & H. 191.

(2) Sect. 13 is as follows:—"A trustee, executor, or other person empowered to invest money in public stocks, or funds, or other government securities, may, unless forbidden by the will or other instrument under which he acts, whether prior in date to this Act or not, invest the same in consolidated stock."

SHAND *v.* DU BUISSON.

V.-C. B.

1874

March 16.

[1868 S. 260.]

Foreign Attachment—Jurisdiction—Garnishee—Equitable Assignment.

A. issued an attachment out of the Lord Mayor's Court against *B.* as garnishee, and *C.* (a native Indian merchant of *Madras*) as Defendant, thereby attaching for a debt due to *A.*, and contracted in this country, a fund belonging to *C.* in the hands of *B.* *A.'s* attachment was defeated by a prior attachment issued by *D.* for an alleged debt due from *C.*, on which judgment was obtained in the Lord Mayor's Court.

The fund having been transferred from the Lord Mayor's into this Court:—

Held, that as *D.* had failed on the evidence to establish the validity of his alleged debt, his attachment was fraudulent, and the judgment based thereon inoperative, so that this Court had jurisdiction to order payment to *A.* out of the fund in Court of the amount of his debt, with interest from the date of his attachment in the Mayor's Court.

B. having a fund in his hands belonging to *C.*:—

Held, that a bill of exchange drawn by *C.* on *B.* for the exact amount of the fund was not an equitable assignment.

The doctrine of *Burn* v. *Carvalho* (1) considered.

THIS was a bill by the Plaintiffs, who carried on business as merchants in *Rood Lane, London*, under the firm of *Shand & Co.*, for the purpose of enforcing their claim, for which they had obtained a garnishee order in the Lord Mayor's Court, to the balance of a fund which had been paid into this Court by the garnishees, as against the Defendant, who also claimed to be entitled to the fund, and by virtue of a prior attachment in respect of a debt alleged by the Plaintiffs to be fictitious, had obtained judgment in the Mayor's Court.

It appeared that *Poolacoora Veerabudra Chetty*, a native Indian merchant at *Madras*, was in the habit of consigning to the Plaintiffs, who carried on business as merchants in *Rood Lane*, aforesaid, with a branch house at *Madras*, produce for sale by them in *London*, and at the same time drew bills against such consignments on Plaintiffs, who accepted the bills and paid them at maturity, and also sold the produce consigned to them and received the proceeds.

(1) 4 My. & Cr. 690.

V.-C. B. 1874 SHAND v. DU BUISSON.

On the 18th of February, 1867, the account between the Plaintiffs and *P. V. Chetty* shewed a balance due to the Plaintiffs of £752 4*s.* 2*d.*

At this time the Defendants, *Du Buisson* and *Cleverley*, carrying on business under the firm of *Henckell, Du Buisson, & Co.*, held a sum of £1035 4*s.* 5*d.* on account of *P. V. Chetty*.

On the 22nd of April, 1868, the Plaintiffs commenced an action in the Lord Mayor's Court against *Poolacoora Veerabudra Chetty* as the Defendant, and issued an attachment for their debt against *Du Buisson* and *Cleverley*.

On the 12th of June, 1868, the garnishees pleaded to the action in the Mayor's Court, and the Plaintiffs subsequently ascertained from them that a prior attachment had been issued on the 12th of March, 1868, in the Mayor's Court by the Defendant *Poolacoora Sarabiah Chetty* for an alleged debt of £1035 4*s.* 5*d.*, claimed to be due from *P. V. Chetty*.

It appeared that on the 24th of October, 1866, *Poolacoora Veerabudra Chetty* was arrested for non-payment of 35,000 rupees, and lodged in prison at *Madras*. In February, 1867, he petitioned for his discharge under the Insolvency Acts, but his petition was dismissed with costs, on the ground that he had fraudulently concealed property from his creditors, and an order made impounding his books. *P. V. Chetty* thereupon endeavoured to effect a compromise with his creditors, and authorized *Henckell, Du Buisson, & Co.* to hold the sum of £1035 4*s.* 5*d.*, then in their hands belonging to him, at the disposal of one *Beliah Chetty*, for the purpose of such compromise. In consequence of the refusal of *Beliah Chetty* to act in the matter, *P. V. Chetty*, in June, 1867, applied to the Defendant *Sarabiah Chetty*, who was his adopted son, and requested him to do what he could to carry out the compromise, and especially to advance him money for the purpose of discharging the claims made on him by some of his creditors. According to the Defendant's statement he consented to act, provided *P. V. Chetty* would give him an order on *Henckell, Du Buisson, & Co.* to pay over to him (Defendant) the full amount of £1035 4*s.* 5*d.* then (as already stated) in their hands belonging to *P. V. Chetty*. *P. V. Chetty* agreed to this, and the Defendant accordingly, as he alleged, paid to certain of the creditors, in discharge of debts due to them from *P. V. Chetty*, sums amounting to 10,380 rupees. In

consideration of these payments, and pursuant to his agreement, *P. V. Chetty* gave Defendant a bill of exchange for £1035 4*s.* 5*d.* on Messrs. *Henckell, Du Buisson, & Co.*, in the following terms:—

"Exchange for £1035 4*s.* 5*d.*

"*Madras*, 26 Aug. 1867.

"On demand of this first of exchange (second of the same tenor and date unpaid) pay to *P. Sarabiah Chetty* or order the sum of £1035 4*s.* 5*d.* for value received, and place the same to account of

"*P. Veerabudra Chetty.*

"To Messrs. *Henckell, Du Buisson, & Co.*,
London."

On the 12th of March, 1868, *Sarabiah Chetty* commenced an action in the Lord Mayor's Court against *P. V. Chetty* as Defendant, for his alleged debt of £1035 4*s.* 5*d.* (the amount then in the hands of the garnishees).

On the 17th of May, 1868, *P. V. Chetty*, who had a few days previously been adjudged insolvent, died in gaol at *Madras*.

On the 26th of June, 1868, *Sarabiah Chetty's* attachment came on for trial in the Mayor's Court, and a verdict and judgment were obtained by him against the garnishees for the sum of £1035 4*s.* 5*d.*

The Plaintiffs thereupon filed their bill to restrain *Du Buisson & Co.* from paying over the £1035 to *Sarabiah Chetty*, or any person other than the Plaintiffs until the Plaintiffs' claim was satisfied, and to obtain payment of their debt with interest thereon from the 18th of February, 1867, and costs of suit, out of the £1035 which, since bill filed, had been paid into Court by *Du Buisson & Co.*, and to restrain the Defendant *Sarabiah Chetty* from proceeding to enforce the judgment obtained by him in the Mayor's Court, which the bill prayed might be declared void and of no effect, on the ground, as charged by the bill, 1, that the alleged debt on which such attachment was obtained was wholly fictitious, and a fraudulent contrivance for the purpose of withdrawing the property of *P. V. Chetty* from his *bonâ fide* creditors in this country; and, 2, that even if the alleged debts arose in the manner alleged by *Sarabiah Chetty*, the alleged payments were made in *India*, out of the jurisdiction of the Mayor's Court, at the request of and by

V.-C. B. 1874

SHAND v. DU BUISSON.

persons resident in *India*, so that the Mayor's Court had no jurisdiction to issue the attachment in favour of *Sarabiah Chetty*.

On payment into Court of the £1035, Messrs. *Du Buisson & Co.* had been dismissed.

Benjamin Brooks, the assignee in insolvency at *Madras* of *P. V. Chetty*, who had been made a Defendant, had disclaimed.

Mr. *Kay*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs:—

The Lord Mayor's Court, being a local and inferior Court, is subject to the jurisdiction of this Court, and as the attachment obtained by the Defendant *Sarabiah Chetty* was in respect of an alleged debt, not arising within the City but incurred in *India*, between parties both resident abroad, this Court will restrain the Defendant from sweeping away the fund by virtue of his attachment thus improperly obtained: *Mayor of London* v. *Cox* (1); *Banque de Crédit Commercial* v. *De Gas* (2). Not only was the attachment improperly obtained, the cause of action having arisen beyond the jurisdiction of the Mayor's Court, but on the result of the evidence this alleged debt is shewn to be wholly fictitious, and a mere device to sweep away this fund from the *bonâ fide* creditors of *P. V. Chetty*. If the attachment relied on by the Defendant fails, then he will rest his case on the bill of exchange of the 26th of August, 1867, as having the effect of an equitable assignment. But the indorsement of a bill of exchange gives only a right to the bill, and does not amount to an equitable assignment: *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (3). Moreover, it is clear upon the evidence that no value was given for the bill.

Mr. *Jackson*, Q.C., and Mr. *Bardswell*, for *Sarabiah Chetty*:—

The security given to us by the document of the 26th of August, 1867, may be informal, but it enures both in substance and in this Court as a good equitable assignment in our favour of the fund therein mentioned. Even if it is a bill of exchange, it does not follow that it may not also be a valid equitable assignment. To constitute an equitable assignment, the form is immaterial; no

(1) Law Rep. 2 H. L. 239. (2) Law Rep. 6 C. P. 142.
(3) Law Rep. 7 Ch. 695.

particular words are necessary: any document which shews an intention of giving to the person in whose favour it is drawn the right to receive the property which is made the subject of the document, will be sufficient. Thus, in equity an order given by a debtor to his creditor, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund: *Burn* v. *Carvalho* (1).

We are also in possession of a prior attachment, on which we have obtained judgment in the Lord Mayor's Court, and the Plaintiffs are mere creditors (even assuming that their cause of action arose in this country—which we deny, the debt having been contracted by *Veerabudra Chetty* with the *Madras* branch of Plaintiffs' firm), who have no possible claim in this Court except such as may arise from their having wholly failed at law; and with the result of those proceedings, which were properly and successfully taken by Defendant, and could only be transferred by a *certiorari*, this Court has no jurisdiction to interfere.

SIR JAMES BACON, V.C.:—

In my opinion the Plaintiffs have very clearly shewn and proved that the debt in respect of which they claim was contracted within the jurisdiction of the Lord Mayor's Court, and therefore suable for in that Court. The proceedings by attachment in the Lord Mayor's Court on the part of the Plaintiffs were perfectly right as far as they went, and they were intercepted by the course pursued by the Defendant. The assistance of this Court was invoked, and the whole affair is transferred to this Court. It has been argued that the proceedings in the Lord Mayor's Court could only be transferred to this Court by a writ of *certiorari*, but I am unable to adopt that view. Either by the consent of both parties, or at the instance of one and in spite of the other, the question which arises in the Mayor's Court, together with the fund, is brought into this Court, and the Plaintiffs desire to have their right adjudicated upon by this Court; the assignee of *P. V. Chetty*, the only claimant to the fund, other than the Plaintiff and Defendant, having withdrawn. I consider, therefore, that this Court has full jurisdiction to decide between these parties the questions raised upon this record, and

(1) 4 My. & Cr. 690, 702.

V.-C. B. 1874 SHAND v. DU BUISSON.

that the Court can make a decree now as between these parties, and relating to the fund which the Court has taken into its possession in order that the rights relating to it may be determined.

Considering, therefore, as I do, that the Plaintiffs' rights are just the same as they would have been if they had carried the proceedings in the Lord Mayor's Court to a conclusion, I am bound now to make a decree according to the prayer of the bill, if satisfied that the Plaintiffs' claim is established. The evidence of the debt is clear and conclusive, and has not been called in question in the slightest degree. The sum claimed is £752 4*s*., the balance of an account which is described to have arisen upon the transactions mentioned in the Plaintiffs' evidence. Then it is suggested by the Defendant that the Plaintiffs have no equity to prefer their claim in this Court. If I am right in saying that, but for the interference of the Defendant, it is a suit which might have been determined in the Mayor's Court, and could only be determined there in one way, the same right exists in the Plaintiffs now, and they have in this Court an equity which entitles them to the decision in their favour which they would inevitably have obtained in the Mayor's Court but for the Defendant's proceedings.

The other objection taken, that there is no proof that the debt was contracted in *London*, fails in point of fact; for the evidence on that subject is clear and conclusive.

The Defendant then raises this case, that the bill of exchange of which he is the holder amounts to an equitable assignment of the debt. I do not desire to narrow the jurisdiction that has been handed down to this Court, by which an equitable assignment may be dealt with in this Court; but it is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been indorsed to any individual, or to any number of people, who might have indorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains, and has no other vitality or effect, and to call it an assignment of a debt would be to call it not by its right name. The other ground upon which the Defendant insists upon his right to it is, that he advanced money of his own for the payment of the debt of the debtor, and that upon a contract then

entered into, he was entitled to the money, and that the bill of exchange is only evidence of that contract. That must rest upon evidence, and if I look at the evidence, I cannot say that it seems to me in the slightest degree satisfactory.

His Honour, after referring to the evidence, and observing that the account given by the Defendant did not, by any means, inspire confidence, and that if it was necessary to inquire into those facts for the purpose of deciding the case, he should not be disposed to adopt the evidence as to the application of the money by the Defendant, said that the judgment obtained by Defendant in the Mayor's Court was based upon a fraudulent claim, and was utterly void and formed no obstacle to the claim of the Plaintiffs, who were entitled to have their debt, which, upon the evidence, was clearly contracted within the jurisdiction, satisfied out of the money in Court. The order would be for an account and payment of what should be found due to the Plaintiffs in respect of principal, with interest at 5 per cent. from the demand for payment by the proceedings against the garnishees in the Mayor's Court.

Solicitors: Messrs. *Simpson & Cullingford;* Messrs. *Stibbard & Cronshay.*

M. R.
1874
May 1.

ASTLEY *v.* EARL OF ESSEX.

[1868 A. 120.]

Real Estate—Settlement—Conditional Limitation—Name and Arms Clause—Forfeiture for Non-compliance—Ignorance of Condition—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *ss.* 3, 4.

The terms "forfeiture" and "breach of condition" used in the statute 3 & 4 Will. 4. c. 27, ss. 3, 4, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage.

Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition.

An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume the testator's name and arms; and it was provided, that in case any such person should fail or neglect so to do for twelve calendar months after he should become so entitled in possession, his estate and interest should cease, and the estate should go to the person who should be next in remainder and then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in *India*, and being ignorant of his rights under the will, did not comply with the clause:—

Held, that the tenant in tail had not acquired a title by adverse possession, but that on his death, by virtue of the Act 3 & 4 Will. 4, c. 27, s. 4, the remainderman became entitled to the estate:

Held, also, that the remainderman's estate was forfeited by reason of his non-compliance with the name and arms clause.

ROBERT THOMPSON, by his will, dated the 30th of December, 1781, devised all his freehold estates to *Stamp Brooksbank* and *William Whately*, and their heirs, to the following uses: viz., to the use of the said *Stamp Brooksbank* and *William Whately*, and their heirs, during the life of the testator's niece, *Elizabeth Corbett* the elder, the wife of *Thomas Corbett*, in trust for her, the said *Elizabeth Corbett* the elder, and her assigns, for her life for her sole and separate use; and from and after her decease to the use of *William Corbett* (eldest son of the said *Elizabeth Corbett*), and his assigns, for his life, with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of the

first son of the body of *William Corbett* in tail male; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said *William Corbett* successively in tail male, with divers remainders over. And after a proviso enabling *Elizabeth Corbett* and the other tenants for life named in the will to grant leases for twenty-one years, the testator declared his will and meaning to be that all and every the person and persons who should for the time being be, under and by virtue of that his will, entitled to the possession of his real estates for their own benefit after the decease of his said niece, *Elizabeth Corbett*, should, when and so soon as he or they should so become entitled in possession, and when and so soon as he or they should have attained the age of twenty-one years, take and use the surname and arms of *Thompson*, and from thenceforth at all times use such surname and arms, and use his and their best endeavours to obtain an Act of Parliament or other lawful and sufficient license or authority for enabling and entitling him so to do. And in case any such person or persons should neglect or fail to take and use such surname and arms, or to obtain a proper and sufficient license and authority for that purpose for the space of twelve calendar months next after the time when he and they should so become entitled in possession to such estates, or next after the time when he or they should attain the age of twenty-one years, whichsoever of such times should last happen; or if he or they should at any time thereafter fail to use such surname or arms, then and in every such case the estate and interest of the person so failing of and in his said estates and the aforesaid powers (*sic*) consequential thereto, should cease, determine, and be absolutely void to all intents and purposes whatsoever; and the testator's said estates should immediately thereupon go over and belong in possession to the person who should be next in remainder under that his will, and be then *in esse*, in like manner as if the person so failing or neglecting was naturally dead, anything thereinbefore contained to the contrary notwithstanding. And the said testator devised all his copyhold estates to the same uses and for the same intents and purposes, and subject to the same charges, powers, provisoes, and conditions as were thereinbefore contained, specified, and declared concerning his freehold estates (except as to the limitations to his trustees for

M. R. 1874 ASTLEY v. EARL OF ESSEX.

the purpose of preserving contingent remainders), or as near thereto as the nature thereof would admit of.

Robert Thompson died in 1788. He was at the time of his death entitled to extensive freehold, and also to some copyhold, estates in the county of *Essex*.

William Corbett, the eldest son of *Elizabeth Corbett*, assumed the name of *Thompson*, and was thenceforth known as *William Thompson Corbett*. He had five sons, *Thomas George Corbett*, *Robert Corbett* (who died an infant and unmarried), *Andrew Corbett*, and two others, whom it is unnecessary to name.

In 1818 *Elizabeth Corbett*, *William Thompson Corbett*, and *Thomas George Corbett* concurred in suffering a recovery of the freehold estates devised by the will of *Robert Thompson*, under which these estates became vested (subject to the prior life interests of *Elizabeth Corbett* and *William Thompson Corbett*, and to certain charges) in *Thomas George Corbett* in fee. The copyhold estates devised by *Robert Thompson's* will remained, however, unaffected by this recovery.

Elizabeth Corbett died in 1825, and *William Thompson Corbett* in 1832; and upon the death of the latter *Thomas George Corbett* entered into possession of the said freehold and copyhold estates. He did not assume the name of *Thompson*, and died in July, 1868, without ever having had any male issue, and having by his will devised his real estate to trustees upon certain trusts. On his death the trustees of his will procured themselves to be admitted to the said copyhold estates.

Andrew Corbett, the third son of *William Thompson Corbett*, died in 1864, without having disentailed the said copyhold estates, and having had issue several sons. The eldest of these, *Walter Andrew Corbett*, had attained the age of twenty-one at his father's death. He was at the time of the death of *Thomas George Corbett* serving with his regiment in *India*. He had not assumed the name of *Thompson*, and knew nothing of his rights under the will of *Robert Thompson* until after June, 1870. Another son of *Andrew Corbett*, named *Alfred George*, was an infant at his father's death, and attained the age of twenty-one on the 16th of April, 1873, and on the 9th of April, 1874, he duly barred his estate tail in the copyholds.

The present suit was instituted by a person interested under the will of *Thomas George Corbett* for administration, and by an order made in June, 1870, the trustees of that will were empowered to sell parts of the freehold and copyhold estates devised by the will of *Robert Thompson*. Upon the title being investigated, it was discovered that the estates tail created by *Robert Thompson's* will had not been barred as regards the copyholds, and it was assumed that the copyholds had become vested for an estate tail in *Walter Andrew Corbett*, who was accordingly admitted thereto in 1872. Upon this footing an agreement for the sale of part of the freeholds and copyholds was entered into under the sanction of the Court and with the consent of *Walter Andrew Corbett;* but afterwards doubts arose whether the aforesaid assumption was not erroneous, and whether, on the one hand, *Thomas George Corbett* had not gained a title to the copyhold estates by adverse possession, or, on the other hand, *Walter Andrew Corbett* had not forfeited his estate by non-compliance with the name and arms clause contained in the will of *Robert Thompson*.

It was arranged, by consent of all parties claiming any interest in the copyholds, that the question of the title to the purchase-money should be decided on a summons taken out by the Plaintiff in the suit, calling on the purchaser to pay the whole of his purchase-money into Court, and this summons now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Cookson*, for the Plaintiff:—

The name and arms clause applies to every person entitled in possession under the will of *Robert Thompson*. *Thomas George Corbett* ought to have complied with it within one year after he became entitled to the property; he did not do so, and by reason of such non-compliance the estate went over to *Andrew Corbett*, who was then of full age. He ought to have entered or brought his action for recovery of the land within twenty years after this time; for by 3 & 4 Will. 4, c. 27, s. 3, it is provided, that where the person claiming land, or the person through whom he claims, "shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken."

M. R. 1874 ASTLEY v. EARL OF ESSEX.

Andrew Corbett neither entered nor brought an action, and *Thomas George Corbett* consequently acquired a good title by adverse possession.

Mr. *Badcock*, for *Walter Andrew Corbett*:—

I do not admit that the name and arms clause applies to tenants in tail; but if it does, I say that sect. 3 of the statute 3 & 4 Will. 4, c. 27, on which the Plaintiffs rely, is to be read in connection with sect. 4, which is as follows: "Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

[The MASTER OF THE ROLLS:—Must not the terms "forfeiture" and "breach of condition" be read in their strict legal meaning? Does the clause apply to a condition upon the happening of which an estate is to arise under a conditional limitation?]

I submit that these terms are to be read in their largest sense, and that the effect of the clause is to give the remainderman the whole duration of the particular estate and twenty years more, during which he may bring his action: *Sugden's* Vendors and Purchasers (1).

Mr. *Southgate*, being called upon, declined to offer any further observations on this point.

SIR G. JESSEL, M.R.:—

I think I must hold that the effect of the statute is to give a remainderman the right to enter at the termination of the prior estate. I think that the true way of reading the statute is to

(1) 14th Ed. p. 480.

give the words "forfeiture" and "breach of condition" their largest sense, and to make them apply whether the forfeiture gives a right to an estate under a conditional limitation or whether it is a true forfeiture at law, which can only be taken advantage of by the heir. I think, therefore, the true view of this case is, that whether the name and arms clause applied to *Thomas George Corbett* or not (on which point I will hear further argument), the *Statute of Limitations* cannot apply. If the name and arms clause did not apply to *Thomas George Corbett*, then, of course, there has been no forfeiture, and on the death of *Thomas George Corbett*, as he did not bar the entail and died without issue, the next remainderman, whoever he was, would be entitled to possession. If the clause did apply to *Thomas George Corbett*, then I hold that the title of the remainderman accrued by forfeiture or breach of condition within the meaning of the 4th section of the 3 & 4 Will. 4, c. 27; that those words include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule; and that this section was intended to apply to both those cases, and consequently the original right, if I may call it so, of the remainderman to enter on the expiration of the previous estate in the natural way, upon the death of the tenant for life, is not taken away by the tenant for life committing a forfeiture. To hold otherwise would have a very strange result. Take, for instance, the case of a clause of forfeiture and conditional limitation over by reason of the tenant for life not residing for six months every year at the mansion house,—a point which is exceedingly difficult to ascertain, because residence has been decided not to require that a man shall actually sleep there every night; then, if the tenant for life broke this condition and lived twenty years after, he would acquire a fee simple, unless the 4th section applies to such a case. I think that such a result would greatly surprise the remainderman, and it would really be too absurd. I must, therefore, read the 4th section in its widest sense, and hold that it applies to such conditional limitations as these as well as to other cases of forfeiture. Consequently, I think that whoever

M. R. 1874 ASTLEY v. EARL OF ESSEX.

has a title the devisees under the will of *Thomas George Corbett* have not.

There still remains the question whether the clause applies to a tenant in tail or not.

Mr. *Badcock* contended that the clause did not apply to tenants in tail, citing *Corbet's Case* (1); *Jarman* on Wills (2).

He further contended that even if it did apply, still time did not begin to run against *Walter Andrew Corbett* until he had notice of the condition: *Doe* v. *Beauclerk* (3).

Mr. *Blakesley*, for *Alfred George Corbett*, cited *In re Hodges' Legacy* (4).

Mr. *Borrett*, for the purchaser, cited *Re Catt's Trusts* (5).

Mr. *Cadman Jones*, for the trustees of *Thomas George Corbett's* will.

SIR G JESSEL, M.R., commented at considerable length on the clause in question, and came to the conclusion that although the testator had not expressed himself with perfect accuracy, the Court was not prevented from giving effect to the plain direction that every person who should under the will be entitled to possession of his real estate, should do certain acts within a certain time, and in case of any person failing so to do, his estate and interest should cease and determine. His Honour then continued:—

I hold, therefore, that the clause does apply to a tenant in tail. I have already held that *Walter Andrew Corbett*, the next remainderman, became entitled in 1868, and as he was then twenty-one he would certainly forfeit unless the fact of his being ignorant of the will itself and of the condition will protect him.

Now, as to that, I think the case of *Porter* v. *Fry* (6) is a clear and distinct authority. In that case there was a devise to a lady in tail upon condition that if she married without consent the

(1) 1 Rep. 83 b.
(2) 3rd Ed. vol. ii. p. 18.
(3) 11 East, 657.
(4) Law Rep. 16 Eq. 92.
(5) 2 H. & M. 46; 33 L. J. (Ch.) 495.
(6) 1 Vent. 199.

(5 Jur. N.S. 536

estate should go over. She did marry without consent, but she had no express notice of the devise, and it was contended for her that as she did not know of the devise, and did not know, therefore, of the condition, that she was entitled to say that she was not liable to the condition until she knew of it. However, the Judges gave judgment against her on the ground that the testator had made no such exception. They said, if the person liable to the condition had been heir-at-law, and so could have entered under another title, believing himself to be in under his common law title, he was not to be ousted of that title without notice of the will. But where he was a stranger, that is, a person not heir-at-law, he being a stranger could only take the benefit of the devise under the will by complying with its terms; and if he did not know of the will, it was a great misfortune for him; but as want of knowledge had not been excepted by the testator himself, they could not make a will for him or make a new case of exception. When you come to look at this will you have a very good illustration of the force of these reasons, because the testator himself exempts persons not entitled to possession, and he exempts persons who are infants, but he has made no other exemption. The principle of that case of *Porter* v. *Fry* (1) was followed very recently in the case of *In re Hodges' Legacy* (2), where the legatee was in *India*, as *Walter Andrew Corbett* was here. The principle is, that a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions; and on that principle it appears to me that Mr. *Badcock's* client is not exempted from the operation of the clause, and consequently the money representing the estate which has been sold will belong to Mr. *Blakesley's* client, and I will make an order accordingly.

Solicitors: Messrs. *Frere & Co.*; Messrs. *White, Borrett, & Co.*; Mr. *Deedes*; Messrs. *R. M. & F. Lowe.*

(1) 1 Vent. 199. (2) Law Rep. 16 Eq. 92.

M. R.
1874
May 25.

WELLS *v.* KILPIN.

[1873 W. 44.]

WELLS *v.* KILPIN.

[1873 W. 81.]

Judgment Creditor—Equitable Interest in Land—Equitable Execution—Form of Decree—Law of Judgments Amendment Act (27 & 28 *Vict. c.* 112.)

A judgment creditor, who has sued out an elegit but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties.

Form of decree in such a case.

THE Plaintiff, *William Henry Wells*, was a judgment creditor of the Defendant *Charles James Kilpin*, who was entitled, under the will of *James Widmore*, to an equitable life estate in certain lands and hereditaments in *Hampshire*. The legal estate was vested in *John James* as trustee of the will. The interest of the Defendant *Charles James Kilpin* was subject to divers mortgages created by him in favour of various persons, one of whom was stated to be in possession under his mortgage.

The Plaintiff had issued writs of elegit and caused them to be registered, but in consequence of the legal estate being outstanding, and of the existence of the said mortgages (which were prior to the Plaintiff's judgments), he was unable to obtain execution against the property.

The first of these suits was instituted in respect of three judgments recovered on the 5th of February, 1872. The Defendants were the said *Charles James Kilpin* and *John James*. The bill prayed for a declaration that the judgments constituted good and valid charges on the estate of the Defendant *Charles James Kilpin* in the said lands and hereditaments, subject only to prior incumbrances; for an account of what was due to the Plaintiff on the said judgments; for an order for payment by the Defendants of

what should be so found due, and in default for foreclosure; and for a receiver.

The second suit was instituted against the same Defendants in respect of a judgment recovered on the 12th of March, 1872. The same parties were Defendants, and the same relief was prayed, as in the first suit.

The Defendant *John James* claimed to be entitled to a charge on the property posterior to all the Plaintiff's judgments.

The suits now came on to be heard together.

Mr. *Townsend* (the *Attorney-General*, Sir *R. Baggallay*, with him), for the Plaintiff, submitted that the Plaintiff was not bound to redeem the prior incumbrancers, but was entitled to relief in the nature of equitable execution against the Defendants: *Hatton* v. *Haywood* (1).

Mr. *Waller*, Q.C., and Mr. *S. Dickinson*, for the Defendant *Kilpin*:—

The proper course for the Plaintiff to take was to redeem the prior incumbrancers: *In re Duke of Newcastle* (2); *In re South* (3); *Beckett* v. *Buckley* (4). No portion of the relief prayed for by the bills can be granted. The Plaintiff is not entitled to a charge on the property; to hold otherwise would be in direct contravention of the statute 27 & 28 Vict. c. 112. If the Plaintiff is not entitled to a charge on the property he cannot be entitled to foreclosure. Neither is he entitled to a sale by way of equitable execution; for in the first place the bill does not pray for such relief, and further, the only relief which the Court gives by way of equitable execution is to remove a legal obstacle in the creditor's way, and that is done by permitting him to redeem: *Neate* v. *Duke of Marlborough* (5). Finally, the Court will not appoint a receiver where a prior incumbrancer is in possession: *Berney* v. *Sewell* (6).

Mr. *Southgate*, Q.C., and Mr. *Bevir*, for the Defendant *James*.

(1) Law Rep. 9 Ch. 229.
(2) Ibid. 8 Eq. 700.
(3) Ibid. 9 Ch. 369.
(4) Law Rep. 17 Eq. 435.
(5) 3 My. & Cr. 407.
(6) 1 Jac. & W. 647.

M. R. 1874 WELLS v. KILPIN.

SIR G. JESSEL, M.R., said that the Plaintiff was not bound to redeem the prior incumbrancers; that he was not entitled to foreclosure, but that he was entitled to equitable execution, and consequently to have the property sold and a receiver appointed; but the receiver would be appointed without prejudice to the rights of prior incumbrancers, and he must not interfere with any prior incumbrancer who might be in possession. There would be one decree in both suits.

The decree was drawn up in the following form:—

Order that a proper person be appointed to receive the rents and profits of the real estate set forth in the 3rd paragraph of the answer of the Defendant *John James*, filed the 26th of May, 1873, but without prejudice to the right of any prior incumbrancer, and if any prior incumbrancer is in possession, then without prejudice to such possession; and the tenants of the said real estate are (subject as aforesaid) to attorn and pay their rents in arrear and growing rents to such receiver. Order the receiver to pass his accounts from time to time, and pay his balances into Court to the credit of this cause.

Take an account of what is due to the Plaintiff under and by virtue of his judgments at law in the bills mentioned, and for his costs of these suits to be taxed by the Taxing Master.

Order that upon the Defendants, or either of them, paying to the Plaintiff what shall be certified to be due on the said account within six calendar months after the date of the Chief Clerk's certificate, at such time and place as shall be by such certificate appointed, then, in the event of such payment being made by the Defendant *John James*, that the Plaintiff do assign his said judgments to the said Defendant *John James*, but in the event of such payment being made by the Defendant *C. J. Kilpin*, then that the Plaintiff do enter up satisfaction on his said judgments; but in default of the Defendants, or either of them, paying to the Plaintiff what shall be so certified to be due on the said account by the time aforesaid, the interest of the Defendant *Charles James Kilpin* of and in the said real estate be sold with the approbation of the Judge, and that the money to arise from the said sale be paid into Court to the same credit. Reserve further consideration. Liberty to apply. 15 Ch D 1590 2 Seton 1139 2nd ed

Solicitors: Messrs. *Hurford & Taylor;* Messrs. *Garrard & James.*

TURNER *v.* BUCK.

M. R.
1874
May 26.

[1869 T. 60.]

Will—Legacy payable out of Proceeds of Sale of Real Estate—Interest on Legacy.

Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay certain legacies:—

Held, that interest on the legacies was payable from the period of a year after the testator's death.

Pearson v. *Pearson* (1), *Spurway* v. *Glynn* (2), and *Shirt* v. *Westby* (3) distinguished.

JOHN BESSEMERES, by his will, devised certain real estate to trustees upon trust for sale, and to stand possessed of the proceeds of such sale upon trust to pay thereout a legacy of £1000 to his daughter, and a legacy of £1000 to his son *William Bessemeres* (since deceased), and certain other legacies therein mentioned.

The suit was instituted for the administration of the testator's estate, and the question was raised, on further consideration, by the administrator of the deceased legatee, whether the legacies carried interest from the death of the testator.

Mr. *Waller*, Q.C., and Mr. *Colt*, for the Plaintiff.

Mr. *Southgate*, Q.C., and Mr. *Cust*, for the testator's widow.

Mr. *Cozens-Hardy*, for the administrator of *William Bessemeres*:—

The legacies are not payable out of the personal estate, but are solely charged on the real estate. The rule by which interest is calculated from the end of a year from the testator's death does not apply.

In *Pearson* v. *Pearson* (1), the rule was thus stated: "In

(1) 1 Sch. & Lef. 10. (2) 9 Ves. 483.
(3) 16 Ves. 393.

M. R. 1874 TURNER v. BUCK.

the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator."

In *Spurway* v. *Glynn* (1), where there was a devise upon trust by demise, sale, or mortgage, or by rents or profits, to raise and pay with all convenient speed the sum of £400, interest was decreed from the death of the testator.

In *Shirt* v. *Westby* (2) a charge by will on real estate of simple contract debts of another person was considered as a legacy carrying interest from the death of the testator.

The same principle applies here, and interest must be calculated from the testator's death.

SIR G. JESSEL, M.R.:—

The cases referred to were all cases where legacies were charged upon, or directed to be raised and paid out of the rents and profits of real estate, or by mortgage, but there is no authority for applying the principle there adopted to the case of legacies payable out of the proceeds of the sale of real estate. Here the legatees can only claim interest from the period at which the sale of the real estate might reasonably have been effected. I am of opinion that a year from the testator's death is a reasonable period, and interest will accordingly be payable from that time.

Solicitors: Mr. *A. Turner;* Messrs. *Flux & Leadbitter.*

(1) 9 Ves. 483. (2) 16 Ves. 393.

WHITE *v.* JAMESON.

[1873 W. 139.]

M. R.
1874
June 5.

Injunction—Nuisance—Liability of Occupier of Land for Acts of his Licensee—Practice—Parties.

Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a Defendant to a suit to restrain the nuisance.

2 C.L.D. 96-7
10 C.L.D. 159

THE Plaintiff was the owner of certain cottages situate on the north side of a street called *Terrace Road* in *Widnes*. This street was twenty-four feet wide. On the south side of it, opposite the cottages, was a ship-yard belonging to and occupied by the Defendant *William Jameson*. On this yard a brick kiln was erected, within forty-five feet of the cottages, and was lighted. The suit was instituted against *William Jameson* and *William Proffitt*, to restrain the burning of the bricks so as to be a nuisance to the Plaintiff's cottages and the occupiers thereof.

It appeared that the Defendants had, in May, 1873, entered into an agreement in the following terms:—

"I, *William Proffitt*, do hereby agree to excavate and take away all clay to the depth of ten feet or more, where required, from the ship-yard belonging to *William Jameson*. That is to say, all clay and soil to the depth of ten feet or more, where required, from under all sheds, offices, and smithy. I will excavate and take away any and all of it at my own cost. And in payment thereof will give to the said *William Jameson* one shilling and sixpence for every 1000 bricks made therefrom. The said *William Jameson* to take as payment thereof as many good and well-burnt bricks to the amount of 1*s.* 6*d.* for every 1000. The same to be taken at a fair market value, weekly or otherwise.

"I, *William Proffitt*, do undertake to give the said *William Jameson* a correct account of all bricks made weekly, that he may take to the amount of his claim and thereby be paid for the said clay as the work proceeds."

M. R. 1874 WHITE v. JAMESON.

Soon after the agreement had been entered into, *Proffitt* erected and lighted the kiln in question.

By his answer, *Jameson* stated that he had authorized *Proffitt* to burn in the yard into bricks the clay found in the yard, but had reserved no power to direct when or how such burning should be carried on; and he denied that he had taken any active part in the erection of the kiln or burning of the bricks.

The cause now came on to be heard. The Defendants both denied that any nuisance was ever committed or intended to be committed; but the Court decided against them on that point. The Defendant *Jameson* further contended that he was in no way liable for the acts of *Proffitt*, and ought not to have been made a party to the suit: and the present report is confined to that question.

Mr. *Chitty*, Q.C., and Mr. *Kekewich*, for the Plaintiff.

Mr. *Rigby*, for the Defendant *Proffitt*.

Mr. *Southgate*, Q.C., and Mr. *Medd*, for the Defendant *Jameson*, contended that he ought not to have been made a party to the suit. The acts complained of were not done by *Jameson* but by *Proffitt*. It was true that *Jameson* had authorized *Proffitt* to burn bricks on the land, but he had not authorized him to commit a nuisance, and there were parts of the land on which bricks might be burnt without any nuisance to the Plaintiff's cottages. Moreover, *Jameson* had not reserved to himself any right to control *Proffitt*, and the latter was therefore exclusively liable: *Rich* v. *Basterfield* (1).

Mr. *Chitty* referred to *Saxby* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2); *Rex* v. *Pedly* (3); *Todd* v. *Flight* (4).

SIR G. JESSEL, M.R., stated the facts, and decided that the burning of the bricks was a nuisance to the Plaintiff's cottages, and continued:—

I hold the Defendant *Jameson* liable to be sued for the acts

(1) 4 C. B. 783.
(2) Law Rep. 4 C. P. 198.
(3) 1 A. & E. 822.
(4) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.

complained of. The land on which they were committed was his; and, independently of his having an interest in the profits, the Defendant *Proffitt* did these acts by his license. The law on this subject is laid down in *Laugher* v. *Pointer* (1), a case which itself related to a very different matter. Mr. Justice *Littledale* there says: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." These observations are exactly in point, and have been cited with approbation in *Quarman* v. *Burnett* (2) and *Rich* v. *Basterfield* (3). Now here *Jameson* was in possession of the property, for he did not demise it to *Proffitt*, he merely granted to him a revocable license to burn bricks on it. Consequently he has brought *Proffitt* on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law.

His Honour then commented on the defence set up by *Proffitt*, and made a decree for a perpetual injunction with costs against both Defendants.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Mr. *W. H. Linaker, Runcorn;* Messrs. *Cole, Cole, & Jackson*, agents for Messrs. *Davies & Brook, Warrington;* Messrs. *Young, Maples, Teesdale, & Co.*, agents for Messrs. *Beasley & Oppenheim, Widnes.*

(1) 5 B. & C. 547, 560. (2) 6 M. & W. 499.
(3) 4 C. B. 783.

M. R.

1874

June 4, 5, 9.

HONYWOOD *v.* HONYWOOD.

[1862 H. 121.]

Tenant for Life and Remainderman—Waste—Timber—Thinnings—Property in Trees when cut down—Local Custom.

6 Ch. D. 141, 2
13 Ch. D. 68

Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timberlike trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings.

Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance.

Where the Court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste.

A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste; but, *semble*, equity would not allow him to retain the proceeds of wrongful cuttings.

Local custom as to timber observed upon.

WILLIAM PHILIP HONYWOOD by his will devised all his real estates to trustees, upon trust to manage the same, and, after certain payments therein mentioned, to pay the rents and profits to his wife during her life or widowhood, with remainders over.

The testator died in 1859, and the suit was instituted by Mrs. *Honywood* for the administration of his estate. Various inquiries had been directed by the decree, and orders had been made from time to time for felling part of the timber on the estate, and directing that some part of such felled timber might be used for repairs on the estate, and that the remainder might be sold, and the proceeds paid into Court and invested, and the income thereof paid to the widow as tenant for life.

It appeared that part of the money thus paid into Court represented the proceeds of the sale of trees, which, according to the

evidence of the agent for the estate, were ripe and fit to be cut, and would not improve but lessen in value, and that it would be for the benefit of the estate if they were cut.

The question which came before the Court, on further consideration of the suit, was, as between the Plaintiff, as equitable tenant for life, and the remainderman, whether the proceeds of the sale of the trees, which were felled in the regular course of thinning, or which were fit to be cut, and would not improve by standing, and which were injurious to the other timber, belonged absolutely to the Plaintiff, or whether she was only entitled to the income thereof when invested.

Mr. *Fischer*, Q.C., and Mr. *Hanson*, for the Plaintiff:—

The Plaintiff, as equitable tenant for life, subject to impeachment for waste, is entitled to the proceeds of the sale of timber cut periodically in the regular course of thinning, and also of those trees which would not improve by standing or which would injure the growth of other timber.

In *Earl Cowley* v. *Wellesley* (1), part of a devised estate in *Hampshire* consisted of woodlands, where the underwood was cleared every year, and such trees were periodically cut down as were likely to obstruct the growth of other trees, and part of the estate in *Wiltshire* consisted of woodlands containing oak, ash, elm, Scotch fir, birch, and spruce trees, and underwood, and it had been considered desirable, in order to improve the growth of the woods, to fell a number of the trees of all these descriptions for the purpose of improving the growth of the remaining trees; in that case Lord *Romilly* held that the money produced by the sale of timber on the *Hampshire* estate, where it had been cut in the regular course of thinning, should be treated as income, and that the money produced by the sale of timber on the *Wiltshire* estate should be treated as capital, except where it had been cut in the regular course of thinning.

[SIR G. JESSEL, M.R., said that he had sent for the special case in *Cowley* v. *Wellesley*, and it appeared that the thinnings on the

(1) Law Rep. 1 Eq. 656. 35 Beav. 635

M. R. 1874

HONYWOOD v. HONYWOOD.

Wiltshire estate were young plantations, and not properly timber at all.]

In *Bagot* v. *Bagot* (1) Lord *Romilly* observed: "It does not follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, *i.e.*, every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land, to which the tenant for life would be entitled. So also, I apprehend that proper and regular thinning of a wood for the purpose of improving the rest of the trees within certain limits would not amount to a waste."

[SIR G. JESSEL, M.R.:—Those observations apply to what is known as a timber estate.]

In *Pidgeley* v. *Rawling* (2) it was held that the thinnings of fir trees under twenty years of age belonged to the tenant for life.

In *Bateman* v. *Hotchkin* (3) a tenant for life, impeachable for waste, was held entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

The subject of timber trees, and what trees are considered timber in different parts of the country, is treated of in *Cruise's* Digest (4), and is also discussed in *Bullen* v. *Denning* (5). In *Kerr* on Injunctions (6) the rule is thus stated: "It is not waste to cut down trees which are not timber either by law or custom, or from the situation in which they are placed, unless some special prejudice arises thereby to the inheritance. Nor is the proper and regular thinning of a wood for the purpose of improving the rest of the trees waste, provided it is done in a reasonable and husbandlike manner."

SIR G. JESSEL, M.R.:—It is settled law that a tenant for life, impeachable for waste, may cut timberlike trees under twenty

(1) 32 Beav. 509, 517.
(2) 2 Coll. 275.
(3) 31 Beav. 486.
(4) Vol. i. p. 116.
(5) 5 B. & C. 842.
(6) Page 240.

years of age for the necessary purpose of preserving or allowing the growth of other trees.

Mr. *Southgate*, Q.C., and Mr. *Freeling*, for the trustees of the will, and Mr. *Crossley*, for the heir-at-law, were not called on.

June 5. SIR G. JESSEL, M.R.:—

As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of *England;* and, secondly, on the special custom of a locality.

By the general law of *England*, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text writer (1), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated

(1) See *Gibbons* on Dilapidations, p. 215; *Countess of Cumberland's Case*, Moore, 812; *Herlakenden's Case*, 4 Rep. 63 b.

M. R. 1874 HONYWOOD v. HONYWOOD.

merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all.

The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy "germins," as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course of the proper management of this estate, any oaks, ashes, and elms under twenty years old have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste.

Then the only other question to be decided is, in whom is the property of the timber cut down vested? There, I think, the law

is reasonably clear. If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the Court to have it cut down, there the Court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money.

The same course, as I understand it—(there is a decision of Lord *Lyndhurst*, in *Ormond* v. *Kynnersley* (1), the other way, but modern decisions have settled the law)—is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement giving the income to the tenant for life, and so on.

Then we come to the property in trees not timber, that is, those which are not timber either from their nature or because they are not old enough or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down wrongfully, and commits waste, the property is still in him,

(1) 7 L. J. (Ch.) 150.

M. R. 1874 HONYWOOD v. HONYWOOD.

though he has committed a wrong, and would be liable to an action in the nature of waste. I am not sure that would follow in equity. My impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity.

If the present tenant for life has cut down oak, ash, or elm under twenty years of age, in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she will be entitled to the proceeds of the trees, so cut down; and assuming, when I come to look at the affidavits, that there are some which show that there is such a class of tree cut down, as I understand is actually the case, then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to.

As regards the future, I think I have said enough, without any further declaration, to shew what the tenant for life will be entitled to.

June 9. The case was again mentioned, and it appearing that the Plaintiff waived any inquiry as to the proceeds of thinnings cut in time past, and was content to receive the dividends of the funds standing to the timber account, a declaration was made of the rights of the parties as to any future cuttings according to the judgment.

Solicitors: Messrs. *Frere & Co.*; Messrs. *M. & F. Davidson*; Messrs. *Beaumont & Warren.*

ACKROYD *v.* ACKROYD.

[1859 A. 56.]

M. R.
1874
June 10.

Hotchpot—Payments on account of Shares in Residuary Estate—Devastavit—Loss and partial recovery of Assets—Interest.

A testator gave to several of his eight children real estates, and bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, and to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:—

Held, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at £4 per cent. per annum from the testator's death; that the devisees of the real estates must bring into account their estimated values as part of the principal; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares.

THE question in this case was whether certain sums which were to be brought into hotchpot were to be brought in with interest.

The testator, *Thomas Ackroyd*, by will made in 1854, devised and bequeathed to several of his children certain real and personal estates, which he stated that he valued at the sums therein mentioned, and he further stated he had advanced to certain of his children whom he named the amounts of money which he mentioned. He then bequeathed his residuary personal estate to trustees on trust for conversion, and directed that the proceeds should be held in trust for his eight children therein named. He went on to direct that the shares or fortunes of his children should be equal, or as nearly so as might be, and to that end that the real and personal estate thereby devised and bequeathed to some of them, and the provision already made in real or personal estate by him for some of them, as thereinbefore mentioned, should be taken by them respectively on account of their shares or fortunes under that his will at the amounts or prices thereinbefore named and estimated by him as the value thereof.

The testator died in 1854, and in 1859 a decree was made at

M. R. 1874 ACKROYD v. ACKROYD.

the suit of three of the residuary legatees for the administration of his estate. Shortly afterwards the principal acting executor and trustee absconded to *America*, indebted to the estate in upwards of £10,000, and never returned. The greater part of this sum was, after long delay, recovered by enforcing the orders of the Court against his property, and the suit now came on upon second further consideration that the funds in Court might be distributed.

The principal question now was how the sums directed by the testator to be brought into account were to be brought in. The surviving Plaintiff contended that, in distributing the fund in Court, the parties who had received those sums must bring them into hotchpot, with interest at £4 per cent. from the death of the testator. The Defendants contended that they were to be brought in without interest.

Mr. *Southgate*, Q.C., and Mr. *Cadman Jones*, for the surviving Plaintiff.

Mr. *Chitty*, Q.C., and Mr. *Hanson*, for the Defendants, referred to *Cox* v. *Cox* (1).

THE MASTER OF THE ROLLS held that the sums recovered from the defaulting executor must be considered as consisting of a principal sum with interest thereon at £4 per cent. per annum from the death of the testator, and that the sums directed by the testator to be brought into account must be brought into hotchpot as part of the principal sum. The shares of principal which the legatees were entitled to receive being thus ascertained, that part of the sum recovered which was attributable to interest would be divided among them in proportion to their shares in the principal.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Paterson, Snow, & Burney.*

(1) Law Rep. 8 Eq. 343.

Distinguished. In re FREELAND [1952] 1 Ch. 110

STRONG *v.* BIRD.

M. R.
1874
June 12.

[1871 S. 92.]

Debt—Appointment of Debtor as Executor—Intention to forgive Debt—Incomplete Gift—Release.

B. borrowed £1100 from his step-mother, who lived in his house, paying £212 10*s.* a quarter for board; and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of £212 10*s.*, and continued down to the time of her death (which took place more than four years afterwards) to pay to *B.* the like quarterly sum. *B.* was appointed sole executor of his step-mother, and proved the will: and a suit for administration was instituted:—

Held, that the debt was gone: first, because the appointment of *B.* as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give *B.* the sum of £900 was completed by nine quarterly payments of £212 10*s.* each.

THIS was a suit instituted by one of the next of kin of *Frances Bird*, widow, who died in December, 1870, having made a will containing an appointment of the Defendant as executor, but no disposition of her residuary personal estate. The question which now came before the Court on an adjourned summons was, whether the Defendant was to be charged with a debt of £900, alleged to be due from him to the estate.

It appeared that the testatrix was the step-mother of the Defendant. She had married his father when the Defendant was only three years old, and had no children of her own, and had always shewn the greatest affection for the Defendant, and after she became a widow, and for several years previously to her death, she resided with the Defendant and his wife. She had an annual income of £2000, and paid to the Defendant a sum of £212 10*s.* per quarter for her board and lodging. In 1866 the Defendant borrowed of her the sum of £1100, and it was agreed that this loan should be paid off by a deduction of £100 from each quarter's payment for board. Accordingly, deductions of this amount were made from the quarterly payments made by the testatrix in June

M. R. 1874 STRONG v. BIRD.

and October, 1866. At Christmas, 1866, according to the evidence of the Defendant and his wife, a conversation took place between them and the testatrix, in the course of which the testatrix stated that she did not want to have any more of the money lent returned, and she thereupon drew and gave to the Defendant a cheque for the full quarterly payment of £212 10*s*., and she continued down to the time of her death to pay to the Defendant the like quarterly sum. The evidence of the Defendant and his wife was corroborated by memoranda in the handwriting of the testatrix on the counterfoils of the cheques drawn by her.

The Chief Clerk found by his certificate that the Defendant remained liable for the debt, and thereupon the Defendant took out a summons to vary the certificate, which now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *G. Miller*, for the Defendant, contended that, under the circumstances, the debt had been effectually released in equity: *Flower* v. *Marten* (1).

Mr. *Chitty*, Q.C., and Mr. *Jolliffe*, for the Plaintiff:—

The transaction amounted at most to an attempt to make a gift which has not been perfectly carried out. The debt was not released at law: it is a case of accord without satisfaction. Neither is there any release in equity; for a mere voluntary declaration of intention, not being under seal, has no greater operation in equity than it has at law: *Cross* v. *Sprigg* (2); *Peace* v. *Hains* (3). There are, it is true, cases in which a debt has been held to be released in equity, although no legal release had been executed, as, for example, *Yeomans* v. *Williams* (4) and *Taylor* v. *Manners* (5); but in all of them the creditor had induced the debtor to alter his position on the faith of a promise not to enforce the debt. That was also the ground of the decision in *Flower* v. *Marten*. Here there is nothing of the kind. In order to bring himself within the authority of these cases, the Defendant ought, before the death of the testatrix, to have been in a position to obtain an injunction to restrain her from enforcing the debt; and it is submitted that he never was in such a position. It is clear that the

(1) 2 My. & Cr. 459.
(2) 6 Hare, 552.
(3) 11 Hare, 151.
(4) Law Rep. 1 Eq. 384.
(5) Law Rep. 1 Ch. 48.

appointment of the debtor as executor did not operate in equity as a release: *Ingle* v. *Richards* (1).

Mr. *Mackeson*, Q.C., Mr. *Mander*, and Mr. *A. Thomson*, for other parties.

SIR G. JESSEL, M.R.:—

Notwithstanding the arguments which have been submitted and the cases which have been cited, I think I can do justice in this case, which appears to be as fair and honest a case as was ever submitted to a Court.

The facts are these: The Defendant in 1866 borrowed £1100 from a lady who was his step-mother, and evidently entertained towards him all the feelings of a mother. She lived in the Defendant's house, and being possessed of a large income, appears to have allowed him £850 a year, payable by quarterly instalments, for her maintenance. The agreement as to the loan was that it should be paid off by a deduction of £100 from each quarter's payment for board; and in pursuance of this arrangement she deducted £100 in June and also in October, 1866, after which time, according to the Defendant's evidence, she refused to make any further deductions, and expressly forgave him the debt. If it stood on that alone, I think the rule of the Court would prevent me from acting on that evidence; but the Defendant's evidence is corroborated by his wife, and also by memoranda on the counterfoils of the cheques drawn by the testatrix. [His Honour then read the material passages from the wife's affidavit, and continued:—] It appears that she lived for four years after Christmas, 1866, and paid sixteen quarters' board at the rate of £212 10*s*.

Upon these facts, I consider it to be clear that whether Mrs. *Bird* did or did not give in law, she intended to do so. The question is, Did the law allow her to make this a complete gift without doing more than she actually did?

First of all, it is said, and said quite accurately, that the mere saying by a creditor to a debtor, "I forgive you the debt," will not operate as a release at law. It is what the law calls *nudum pactum*, a promise made without an actual consideration passing,

(1) 28 Beav. 366.

M. R. 1874 STRONG v. BIRD.

and which consequently cannot be supported as a contract. It is not a release, because it is not under seal. Therefore the mere circumstance of saying, "I will forgive you," will not do. There are, however, two modes in which, as it appears to me, the validity of this transaction can be supported. First of all, we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this. The donor, or the alleged donor, had made her will, and by that will had appointed Mr. *Bird*, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor. It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose; but if the gift is clear, and there is to be no recall of the gift, and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect. For instance, suppose this occurred, that a person made a memorandum on the title-deeds of an estate to this effect: "I give *Blackacre* to *A. B.*," and afterwards conveyed that estate to *A. B.* by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be that there is no resulting trust; that is rebutted by shewing that the person who conveyed did not intend the person taking the conveyance to be a trustee, and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law, notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, when a testator makes his debtor executor, and thereby

releases the debt at law, he is no longer liable at law. It is said that he would be liable in this Court: and so he would, unless he could shew some reason for not being made liable. Then what does he shew here? Why he proves to the satisfaction of the Court a continuing intention to give; and it appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a Court of Equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him.

On that ground I shall hold that this gentleman had a perfect title to the £900; but there is another ground which I think is equally clear, namely, the testatrix living for more than nine quarters after the period when she forgave the debt, and paying the full amount for board, without any deduction.

Now, what were her legal rights? By the bargain that was made her legal right was to retain £100 every quarter out of the quarterly amount payable for board. It was not a question of set-off, but it was a legal debt. She, therefore, when the quarter expired, owed this gentleman £112 10*s.* and no more, and if he had brought an action for more, she could, by paying the £112 10*s.* into Court, without any plea of set-off, have succeeded in the action. His legal right was to obtain from her at the end of each quarter £112 10*s.* At the end of each quarter she pays him another £100 which she does not owe him, and when she has made nine of those payments she has paid him £900. It is not any question of intended gift; it is a complete payment by her paying the £900 by instalments of £100 each, which she intended to give him, and which she has given him at each period as they became due by actual payments, and I think that that would enable him to say, "Having been paid, I have a right to retain, because the testatrix intended me to retain," and the gift is perfectly established in that way also.

On both grounds, therefore, I think that this gentleman is entitled to succeed, and I shall allow the summons accordingly.

Solicitors: Messrs. *Mason & Withall;* Messrs. *Chapple & Welch;* Mr. *Farrar;* Mr. *C. J. Mander.*

V.-C. M.
1874
June 2, 3.

PAINE *v.* JONES.

[1871 P. 141.]

Will before Wills Act—General Devise to Trustee—After-acquired Real Estate—Statute of Limitations—Adverse Possession by Trustee.

6 Ch D 8.

A testator, by a will dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death, his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value:—

Held, upon bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed.

Board v. *Board* (1) distinguished.

WILLIAM NICOLL, by his will, dated the 12th of April, 1824, devised all his freehold and copyhold estates, and also all other his estate and effects, whatsoever and wheresoever, and of what nature and kind soever, of which he might be possessed at the time of his decease, to his wife, *Charlotte Nicoll*, and *Thomas Harrison*, and their heirs, executors, administrators, and assigns, upon trust to pay the rents and profits to *Charlotte Nicoll* during her life, for her separate use, and after her death to pay the said rents and profits to his niece, *Ann Hasler*, for her life, for her separate use, and after her death to convey the same freehold and copyhold estates to the children of *Ann Hasler*, as tenants in common, in fee.

On the 9th of September, 1824, the testator purchased, for the sum of £600, a small freehold estate, which was conveyed to him to the ordinary uses to bar dower.

The testator died on the 20th of December, 1830, leaving his nephew, *Thomas Nicoll*, his heir-at-law.

Thomas Harrison disclaimed the trusts of the will, and *Charlotte*

(1) Law Rep. 9 Q. B. 48.

Nicoll, who alone proved the will, entered into possession of all the testator's real estate, including that acquired by him subsequently to the date of the will.

Ann Hasler intermarried with the Defendant *William Paine*, and had issue seven children, of whom the Plaintiff was one, the other children being Defendants.

In 1852 the children of *Ann Paine* instituted a suit of *Paine* v. *Nicoll* against *Charlotte Nicoll*, praying administration of the trusts of the testator's will and for the appointment of new trustees. *Charlotte Nicoll* put in an answer, by which she admitted that the after-acquired real estate of the testator was subject to the trusts of the will. After the filing of the answer, an arrangement was made for putting an end to the suit, and by an order dated the 4th of December, 1852, *Charles Brown* was appointed a trustee of the will jointly with *Charlotte Nicoll*, and she was ordered to convey all the real estate of the testator to the use of herself and such new trustee upon the trusts of the will.

In the preparation of the conveyance necessary to carry this order into effect, it was for the first time discovered that the after-acquired real estate of the testator did not pass by the will, and *Charlotte Nicoll*, upon being informed of this, refused to convey the same; and, by an order dated the 26th of February, 1853, made on the petition of the Plaintiffs in the suit, it was ordered that *Charlotte Nicoll* should convey only the property which passed by the will.

Some time after the presentation of the said petition, an application was made to *Thomas Nicoll*, the heir of the testator, which resulted in an indenture being prepared, dated the 14th of March, 1854, by which *Thomas Nicoll* conveyed all his interest in the after-acquired freehold of the testator to the trustees of *William Nicoll's* will, to be held by them upon the trusts declared thereby. This indenture was executed only by *Thomas Nicoll*, *William Paine* and *Ann* his wife, and *Charles Brown;* but *Charlotte Nicoll*, the widow, though made a party to the deed, never executed it.

On the 3rd of August, 1853, *Charlotte Nicoll*, who claimed to have acquired the fee simple of the after-acquired property by adverse possession, conveyed the reversion therein expectant on her own life to one *Jones*, in fee, for valuable consideration.

V.-C. M. 1874 PAINE v. JONES.

Charlotte Nicoll died in 1858. In 1860, *Jones*, for valuable consideration, conveyed one moiety of the property to *Johnston*, who had acted as solicitor for *Charlotte Nicoll* in the suit.

Ann Paine (formerly *Hasler*) died in 1868. In 1869, *Jones* and *Johnston* sold the property to a Miss *Sandford*, and in the beginning of the following year she sold and conveyed the property to *Thomas Salter*, who died shortly afterwards, having devised it to *Rebecca Salter* and *George Ridding*, upon certain trusts.

In 1871 this bill was filed, alleging that the property was subject to the trusts of the will of the testator, and that *Jones*, *Johnston*, *Sandford*, and *Salter* purchased with notice that such was the case; and praying that they or their representatives might be ordered to convey the property to the present trustees of the testator's will, and might account for the mesne profits.

The cause now came on to be heard.

Mr. *W. Pearson*, Q.C., and Mr. *Warmington*, for the Plaintiff:—

We contend that *Charlotte Nicoll*, the widow of the testator, by entering into possession of the after-acquired property, and dealing with it as part of the property devised to her for life under the will, was estopped from denying that it passed by the will. It is admitted that this was the view taken of the will by all parties. The suit of *Paine* v. *Nicoll* was instituted in 1852 upon that understanding, and Mrs. *Nicoll* put in an answer to the suit admitting that she had taken possession of the after-acquired property, believing that it did pass by the will. It was not till after she had put in this answer that the mistake was discovered, and it was found out that, as the testator died before the passing of the *Wills Act*, the property purchased after the date of the will did not pass. The devise in the will is of "all other his estate and effects whatsoever and wheresoever, and of what nature or kind soever, of which he might be possessed at the time of his decease." These words are so extensive that it was natural that persons not learned in the law should have supposed that all the property of which the testator was possessed at the time of his decease did actually pass. But the widow had, in fact, no title except under the will, and she entered under the will and acquired a possessory title of more than twenty years, which was good as against the

heir of the testator, but was not good as against the remaindermen under the will. She was the sole trustee, and she must be considered as constituting herself a trustee for those persons entitled after her decease to the residue of the testator's property. This case is similar in all respects to *Board* v. *Board* (1), where the tenant for life under the will of a testator entered into possession of the property purported to be devised to her by the will, amongst which was property of which the testator was only tenant by the curtesy, and had therefore no right to devise. She remained in possession for more than twenty years, and thereby acquired a good title as against the heir; but it was held that the tenant for life having entered under the will, those claiming through her were estopped, as against all those in remainder, from disputing the validity of the will. Mr. Justice *Mellor* observed that the tenant for life having accepted the estate under the will, treating it as a perfectly valid will, could not defeat the title of the remainderman under the will by alleging that the devisor had no title; and Mr. Justice *Quain* said: "I decide this case on the simple point that a person who takes under a will and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will." So it was held in *Asher* v. *Whitlock* (2). There the widow had wrongful possession of the estate, but coming in under the will she could not dispute the validity of the will. In *Anstee* v. *Nelms* (3) it was laid down by Chief Baron *Pollock* and Baron *Martin*, that if a person to whom a particular estate is given by will for his life takes possession, and is allowed to keep, as part of that estate, something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman. The same principle was supported in *Hawksbee* v. *Hawksbee* (4), where it was held that a person entering into possession of property under a particular instrument, not being entitled under that instrument, entered as trustee for all the persons who were entitled under the instrument. The widow in this case admitted by her answer that she was in possession under

(1) Law Rep. 9 Q. B. 48, 54.
(2) Ibid. 1 Q. B. 1.
(3) 1 H. & N. 225.
(4) 11 Hare, 225, 230.

V.-C. M. 1874 PAINE v. JONES.

the will, she was therefore trustee for the persons entitled under the trusts of the will, and she and every one claiming under her is estopped from saying that the property did not pass by the will.

They also contended that the purchasers from *Charlotte Nicoll* all took with notice, or, at all events, that *Jones* and *Johnston* did so, and that the last-named Defendants were consequently liable to make good the value of the property to the *cestuis que trust.* It is, however, unnecessary to report the argument on these points.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for Messrs. *Jones* and *Johnston* :—

The whole question is *res adjudicata.* The order made in the suit of *Paine* v. *Nicoll* on the 26th of February, 1853, was clearly meant to exempt *Charlotte Nicoll* from conveying the after-acquired freeholds of the testator; but if *Charlotte Nicoll* had been in the position of trustee of that property, or estopped from denying that it passed by the will, that order would have been wrong, and she ought to have been ordered to convey the after-acquired freeholds as well as the other property of the testator. But on the law of the case that order was quite right. The will of the testator did not purport to pass any interest in the property now sought to be recovered; and this circumstance distinguishes the case from all those which have been cited.

[They were stopped.]

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for *Salter.*

Mr. *Stirling*, for Miss *Sandford.*

Mr. *E. B. Cooper*, for the trustees of the will.

The VICE-CHANCELLOR :—I do not call upon counsel for *Salter* and Miss *Sandford*, as I hold that they were purchasers for value without notice.

Mr. *Pearson*, in reply, upon the question whether the property was subject to the trusts of the will.

SIR R. MALINS, V.C. :—

This is a most unfortunate litigation about a very small property. The question arises under the will of *William Nicoll*, which is

dated the 12th of April, 1824, at a time when the state of the law was, that however clearly a testator might have expressed his intention that he meant to pass after-acquired property, it did not operate so as to effectuate his intention. That is not the state of the law now, but I am bound to construe the will by the law as it stood at the time the will was made. The testator gives all his freehold and copyhold estates, and also all other his estate and effects whatsoever and wheresoever, and of what nature and kind soever, of which he might be possessed at the time of his decease. Those words must be read as meaning all the estate I now have, and which I may continue to have at my death. Then, after making his will, on the 9th of December, 1824, a deed was executed by which the testator had conveyed to him to uses to bar dower the property now in dispute—property worth from £400 to £600. He died on the 20th of December, 1830, and his widow survived him. The will, then, is governed by the state of the law before the *Wills Act;* but the widow, finding, as she did, that the testator had devised all his property which he might be possessed of at the time of his decease, and considering that she was entitled under the will to the property he purchased after the date of the will, entered into possession of it. But it happened that she had no title whatever to this property, and could not take it under the will. Who, then, was entitled? There can be no doubt that the heir-at-law was the only person entitled, and if he had brought an action of ejectment he would certainly have recovered against the widow; but he was bound to bring his action within twenty years, unless he had been under disability, and then he would have had ten years longer in some cases, and twenty years in others. It is not suggested, however, that he was under any disability; therefore, in the year 1853, the heir-at-law was absolutely barred, and the widow, either in her own right by adverse possession or as claiming under the will, acquired an absolute right to the property. It is said that, having entered under the belief that she was entitled under the will, she is bound by the trusts of the will. There was a conveyance prepared, and executed by *Thomas Nicoll,* the nephew of the testator, by which he conveyed all his interest in the after-acquired freehold estate to the trustees of *W. Nicoll's* will, to be held by them upon the

V.-C. M. 1874 PAINE v. JONES.

trusts of the will; this, however, was not executed by the widow, and is not relied on by the Plaintiff.

If the widow had been told the year after the death of the testator that she had no title, but that if she kept quiet for twenty years without saying anything about it, she would acquire a good title, the effect would have been that her title could not have been impugned; but she was not told till after the twenty years had expired. It was not till 1853 that she was told; and the Plaintiff now says that the widow must be treated as having taken possession of the property subject to the conditions of the will. If that be so, the Plaintiff would have a good title in equity to one-seventh share of the property.

It has been argued that the answer put in by Mrs. *Nicoll*, in the suit of *Paine* v. *Nicoll*, was an acknowledgment by her that she had entered into possession under the will, and that she must be bound by that admission, but I do not think that she was bound by the admissions in her answers, which were made when she was ignorant of her rights. It was not till after this period that she was told that the property did not pass by the will, and then, knowing for the first time that she had acquired a good title, the transactions took place which have led to this suit.

In the first place, by a deed of the 3rd of August, 1853, the widow conveyed the property for value, subject to her own life interest, to *Jones*, who was represented by his brother-in-law *Johnston*, and *Jones*, within a year after, conveyed one moiety to *Johnston*. At a subsequent period it appears that Miss *Sandford* applied to *Johnston* to know whether the property was for sale, and a correspondence took place which led to the purchase of the property by Miss *Sandford* for the sum of £400, and she after that sold the property to *Salter;* and those who claim under him, and who are represented by Mr. *Glasse*, are now in possession.

The question then is, whether they are to retain possession, or whether the Plaintiff is entitled to possession. My opinion is that the Plaintiff's title fails. The widow, though she thought that she was entering into possession under the will, was in fact entitled to treat herself as being in adverse possession. She performed no duty imposed under the will, and the cases relied upon by the Plaintiff's counsel have no application.

The principal case cited was *Board* v. *Board* (1). In that case I should concur, for there the testator, *Robert Amesbury*, being tenant by the curtesy only, and having in fact nothing to devise, made a will and devised the property specifically to trustees for his daughter *Rebecca* for life, with remainder to his grandson *William* in fee, but subject to certain annuities. *Rebecca* entered into possession and enjoyed the property under the will, paying the annuities, and in every way shewing that she continued in possession because she was a devisee under the will, and she was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. Then she let the Defendant into possession, who claimed under her; but he, being privy in estate to her, was subject to all the estoppels that would have estopped her. The question, therefore, was, whether *Rebecca*, having taken under the will, which gave her an estate for life, was not estopped from saying that as against *William*, or the person claiming under him, the will, under which she came in as tenant for life, and under which *William* was the remainderman, was void. Mr. Justice *Blackburn*, upon these facts, said *Rebecca* could not be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void, and that the heir-at-law was entitled to the land, and as twenty years had run against his title he was barred, and she, having acquired the fee by twenty years' undisturbed possession, could prevent *William* from taking under the will. *Rebecca* claimed under the will and retained possession under the will, and she, as against everybody interested in the will, was estopped from denying its validity. That is a case in which the parties claimed under the same interest.

The case of *Anstee* v. *Nelms* (2) is to the same effect. There there was a devise of all the testator's lands in the parish of *Doynton*, and it turned out that the land was not strictly in *Doynton*, but it was held that the testator intended to pass it. That case has no application.

Hawksbee v. *Hawksbee* (3) was also cited. There the testator had entered into possession of a house as tenant from year to year in 1810, and paid the rent till 1822, when the landlord died, and there was no person to receive the rent. The testator con-

(1) Law Rep. 9 Q. B. 48. (2) 1 H. & N. 225. (3) 11 Hare, 230.

V.-C. M. 1874 PAINE v. JONES.

tinued in possession till 1837, when he died, having devised his real and personal estate with power of sale for the benefit of his wife and children. The eldest son occupied the house, paying a rent to the widow for fifteen years after the death of his father, when the widow died; and it was held that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the premises adversely to the devisees beneficially interested under the will, but that the latter were entitled to require the property to be sold and distributed according to the directions of the testator.

There was one other case relied upon, which was *Asher* v. *Whitlock* (1), where it was held that a person in possession of land without other title had a devisable interest; and the heir of his devisee could maintain ejectment against a person who had entered upon the land and could not shew title or possession in any one prior to the testator.

All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The Defendants had a title under the will. I think this is a distinct case of adverse possession, and the Defendants claiming under the widow have acquired a title as against those persons whose title is only under the will.

As the Plaintiff has no title, the bill must be dismissed with costs. If the parties consent to the bill being dismissed without costs, it is a different thing; but it can only be done by consent.

It was then intimated that the parties would consent to this course.

The order was therefore made that, by consent of all parties, the bill be dismissed without costs, except as to the trustees, whose costs were ordered to be paid.

Solicitor for the Plaintiff: Mr. *A. G. Ditton.*

Solicitors for the Defendants: Messrs. *Johnston & Jackson;* Messrs. *Gamlen & Son;* Messrs. *Nickinson, Prall, & Nickinson;* Messrs. *Taylor & Baxter.*

(1) Law Rep. 1 Q. B. 1.

POLLOCK *v.* POLLOCK.

V.-C. M.
1874
June 3.

[1874 P. 115.]

Apportionment Act, 1870—*Bequest for Life of Dividends in a Company.*

Bequest of stock in a canal company to trustees to pay the dividends to the testator's wife for life, and afterwards to fall into the residue:—

Held, that the dividends were apportionable.

Whitehead v. *Whitehead* (1) explained.

19 L.T. 272
9 Ch.D. 161
12 Ch.D. 658
18 Ch.D. 163

GENERAL *POLLOCK*, by his will, gave and bequeathed a sum of £5000 guaranteed stock of the *Madras Irrigation and Canal Company* to trustees upon trust to pay the interest and dividends thereof to his wife, Lady *Pollock*, for life, and after her decease he directed that the said £5000 stock should sink into and form part of his residuary estate.

The testator died on the 6th of October, 1872, and Lady *Pollock* died on the 14th of February, 1873. The dividends on the £5000 stock of the *Madras Irrigation and Canal Company* were payable in June and December, and the representatives of Lady *Pollock* now claimed to be entitled to the half-yearly dividend which became due in December, 1872, without apportionment.

Mr. *Glasse*, Q.C., and Mr. *E. Cutler*, for the Plaintiffs.

Mr. *Cotton*, Q.C., and Mr. *Owen*, for the Defendant, cited *Whitehead* v. *Whitehead* (1), in which the decision was that a specific legacy was not within the *Apportionment Act*, 1870, and *Capron* v. *Capron* (2) and *In re Cline's Estate* (3).

SIR R. MALINS, V.C.:—

The expression which I appear to have used in the case of *Whitehead* v. *Whitehead* is too wide. I do not think, as a general rule, that a specific bequest is not apportionable. In this case my

(1) Law Rep. 16 Eq. 528. (2) Law Rep. 17 Eq. 288.
(3) *Ante*, p. 213.

V.-C. M. 1874 POLLOCK v. POLLOCK.

opinion is that there must be an apportionment of the dividends which accrued due in December, 1872, and also an apportionment in favour of the representatives of Lady *Pollock* of the dividends which accrued in June, 1873.

Solicitors for the Plaintiffs: Messrs. *Chauntrell & Pollock.*
Solicitor for the Defendants: Mr. *R. Haynes.*

V.-C. M. 1874 *June* 22.

AXMANN *v.* LUND.

[1874 A. 58.]

Letters Patent—Presumption as to Validity—Circulars threatening Legal Proceedings—Plaintiff formerly Licensee of the Patent.

15 Ch D. 32 — 514 b 522

The Court will restrain a patentee from issuing circulars threatening legal proceedings against infringers unless he will undertake to commence proceedings to assert the validity of his patent; and the fact that the party seeking the aid of the Court was formerly a licensee of the patent under the patentee, and had himself concurred in issuing similar circulars, does not prevent the Court interfering after the expiration of the license.

ON the 26th of November, 1864, the Defendant, who was a manufacturing jeweller, filed a provisional specification for the purpose of obtaining letters patent for an invention for "Improvements in the manufacture of studs, brooches, bracelets, earrings, baskets, vases, and other such-like ornaments;" and, having no means of his own, was introduced to the Plaintiff with a view to his furnishing capital to carry on the manufacture. Negotiations took place between the Plaintiff and Defendant, and ultimately a partnership was arranged between them on the basis of an advance by the Plaintiff of the sum of £800. This advance was made, and a complete specification was filed by the Defendant at the end of the year 1864 or the beginning of 1865.

The Plaintiff and Defendant continued to work the patent together, but the terms of the partnership were not arranged till the 29th of November, 1866, when they were embodied in a deed of that date, which provided that the Plaintiff and Defendant should continue and be partners together in the business of manu-

facturing and vending the studs, buttons, brooches, bracelets, earrings, baskets, vases, and other such-like articles, fastenings, and things, under and by virtue of the said letters patent for the period of ten years to be computed from the 1st of January, 1866, determinable as therein mentioned; and it was further provided that the patent rights should be considered as belonging solely to the Defendant, but that no part, share, or interest therein should be sold, assigned, or otherwise disposed of by him without the previous consent in writing of the Plaintiff during the co-partnership; and that each of the partners should be entitled to one equal half part of the profits of the business after making all proper deductions.

In the year 1868 the Plaintiff and Defendant, or some of their workmen, discovered and perfected a new process of manufacture, for which they took out a joint patent on the 21st of December, 1868, and filed a complete specification on the 21st of June, 1869. About the same time they discovered a third process, which they called the composite process, which, however, they did not patent. But they continued to manufacture jewelry according to all the three processes.

At various times during the partnership some small infringements of the patent of 1864 came to the knowledge of the parties, which they considered too insignificant to be worth notice. But near the end of 1871 a more important infringement was discovered, and the Plaintiff and Defendant took the advice of counsel as to whether proceedings should be commenced to restrain further infringements. They were advised that the specification was bad as it stood, but that it was possible that it might be made of some value by filing a disclaimer of parts of it; but this was found impracticable, and no proceedings were taken against the infringers.

The Plaintiff and Defendant subsequently finding that they could not continue to carry on business amicably together, dissolved partnership by a deed of the 2nd of July, 1873, by which the Plaintiff assigned to the Defendant his interest in the business in the words following:—

"All that one undivided moiety, or half part, or share of him the said *Edmund Axmann*, of and in the said stock-in-trade, credit,

V.-C. M. 1874 AXMANN v. LUND.

and effects, and also all sums of money belonging or owing to the said co-partnership business, and all the estate and interest of him the said *Edmund Axmann* therein."

After the termination of the partnership the Defendant continued to occupy the business premises and to carry on a similar business to that previously carried on by them in partnership. The Plaintiff, after trying for a short time another kind of occupation, determined to set up a business on his own account as a manufacturing jeweller at another place; and in order to terminate all doubt as to the respective rights of the parties in the patent of 1868, an agreement was signed by them which provided that the patent should be considered as the property of both in equal shares, and that all moneys, benefit, and advantage to accrue from licenses, or from the user or working of the patent, or from rents, royalties, premiums, fines, or other payments, should be divisible between them, and that all fees for renewal or extension should be contributed by them in equal portions, and that each should be equally entitled to work the patent without making any payment to the other of them.

The result of these transactions was that the Plaintiff and Defendant had each of them an equal right to manufacture according to the patent of 1868, and equally so, of course, according to the so-called composite process; but that supposing the patent of 1864 to be valid, the exclusive right of manufacturing according to it belonged to the Defendant.

The Plaintiff commenced business in manufacturing articles according to all the three processes, and, according to the allegations of the bill, the business seemed likely to prove very profitable.

It was part of the Plaintiff's case that he had only recently discovered that on the 15th of March, 1862, a provisional specification had been taken out for an invention which appeared to be an anticipation of the Defendant's patent of 1864, and that the patent of 1864 was also invalid from the fact that on the 26th of May, 1864, the Defendant had filed a provisional specification almost in the identical words of the subsequent one. Assuming this to be the case, the time for filing the complete specification had expired before it was filed, and the patent was bad on that ground.

The bill alleged that soon after the Plaintiff commenced business the Defendant had begun to go about to the different customers of the Plaintiff, asserting that the Plaintiff, in manufacturing and selling his goods in his business, was infringing the Defendant's patents, and threatening the Plaintiff's customers with legal proceedings in case they continued to purchase from the Plaintiff; and several instances were given in which it was proved that attempts had been made to induce different customers of the Plaintiff to take the Defendant's goods in preference to his.

Lithographed copies of two letters had also been circulated amongst the customers of the Plaintiff; the first of which was a letter professing to be addressed by the Defendant's solicitor to Messrs. *Slater, Buckingham, & Co.*, a firm who, it was stated, had advanced money to the Defendant for the purposes of his business. The letter was as follows:—

"I have been consulted by Mr. *Waldemar Lund* with reference to your purchasing and selling imitations of his patented goods. I beg to point out to you that by your selling and supplying such goods you render yourselves and your customers liable to legal proceedings to restrain you from any further sale of them; and unless I receive your assurance that you will discontinue such sales in future, my client will take steps to prevent the injury which is being done this business by you and your customers.

"In the event of your not giving me the required assurance, I I must ask you for the name of your solicitor."

This was accompanied by a letter from Messrs. *Slater, Buckingham, & Co.* to the customer, which was as follows:—

"Having received the above letter, we think it well to send you a copy of the same.

"For ourselves, we do not purchase or sell any imitation of Messrs. *Waldemar Lund & Co.'s* goods, and would recommend you to adopt the same course."

It did not appear that the Defendant ever attempted to discriminate between goods manufactured according to the process of the patent of 1864 and the other modes of manufacture.

The Defendant gave evidence to shew that during the continuance of the partnership, whenever it was discovered that any

V.-C. M. 1874 AXMANN v. LUND.

infringements of the patent were going on, a copy of a circular which had been prepared for the purpose was sent to the parties supposed to be infringing, warning them that they were infringing the patent, and threatening proceedings against them; and that this course was continued after counsel had been consulted as to the validity of the patent. It also appeared that within a few weeks of the dissolution of the partnership the Plaintiff had given the Defendant instructions to look out for any parties who might be infringing the patent.

The bill prayed for an injunction to restrain the Defendant from asserting to the customers of the Plaintiff, or any of them, or any other person or persons whomsoever, that the Plaintiff in manufacturing or selling his goods in his business was infringing the Defendant's letters patent or patent rights, and from threatening such customers, or any of them, or any other person or persons, with legal proceedings in case they purchased or sold the Plaintiff's goods.

The Plaintiff now moved for an injunction accordingly.

Mr. *Cotton*, Q.C., and Mr. *Romer*, for the Plaintiff:—

The patent of 1864 can be conclusively shewn to be bad on several grounds. The Plaintiff, however, has a right to require the Defendant either to assert actively the validity of his patent by taking steps to maintain it, or to abstain from asserting that it is valid, and threatening legal proceedings, to which he has no intention to resort: *Rollins* v. *Hinks* (1), which was a case in all respects similar to the present.

Mr. *Glasse*, Q.C., and Mr. *Jason Smith*, for the Defendant:—

If this case were exactly like *Rollins* v. *Hinks* no argument would be possible; but there is just that distinction between the cases which was pointed out in the judgment in that case, namely, that the rule there laid down might not apply where the question was as to a patent many years old. This is quite in accordance with the old distinction between patents which had long remained undisputed, in which the Court would grant an injunction pending an action to try the validity, and new patents where no injunction

(1) Law Rep. 13 Eq. 355.

was granted pending an action, and the present case is still open for decision. The Plaintiff is in the position of having executed a deed admitting the validity of a patent, and cannot afterwards turn round and say the patent was always bad. That would be allowing him to derogate from his own grant. He could not have questioned the validity of the patent during the continuance of his license to use it, *Crossley* v. *Dixon* (1), and after having in effect assigned all his estate and interest in it as part of the partnership assets, he cannot afterwards question it: *Chambers* v. *Crichley* (2). Here, also, the Plaintiff has been himself doing the very thing during the partnership which he now seeks to prevent the Defendant doing. The issue of these circulars by the Defendant is no more than was done by both during the partnership, and was continued after the time when, according to the Plaintiff's view, the invalidity of the patent was known by means of the opinion of counsel.

SIR R. MALINS, V.C., after remarking upon the facts of the case, continued:—

If the Plaintiff and the Defendant had been mere strangers without any connection in business the case would be covered by my decision in *Rollins* v. *Hinks* (3), to the principles of which I now adhere, that a patentee is not at liberty to go on threatening proceedings against other persons for infringing his patent unless he follows up those threats by proceedings to establish its validity. I there stated that if the Defendant could not be restrained from continuing to use those threats, a man by taking out a patent for something old might issue circulars to prevent others from selling an article which was sold years before the patent. Mr. *Glasse* admitted that if this case were like *Rollins* v. *Hinks* he could not dispute the law there laid down, or defend the proceedings of the Defendant.

The argument has turned upon the question whether this case is or is not distinguishable from *Rollins* v. *Hinks*. Now here the Plaintiff and Defendant have not been mere strangers. It appears that the Defendant took out his patent in the year 1864,

(1) 10 H. L. C. 293. (2) 33 Beav. 374.
(3) Law Rep. 13 Eq. 355.

V.-C. M. 1874 AXMANN v. LUND.

and the Plaintiff afterwards joined him as partner. One of the provisions in the articles of partnership was that the patent rights of 1864 should be considered as belonging solely to the Defendant, but that no part, share, or interest thereon should be sold, assigned, or otherwise disposed of by him without the previous consent in writing of the Plaintiff during the co-partnership. Then these two gentlemen went on from 1866 to 1873, working this patent together, and during that time I think it is distinctly proved that the Plaintiff, in concurrence with the Defendant, continued to assert the validity of the patent by issuing circulars warning the public from infringing it. [His Honour then referred to the evidence on this point, and continued:—] On the 2nd of July, 1873, the partnership was dissolved, without any reservation to the Plaintiff of any rights in the patent of 1864, it being assumed on both sides, and I think correctly, that whatever patent rights there were belonged to the Defendant. As to whether the patent is valid or invalid, I give no opinion. That is not the question before me. There seems very strong reason to doubt its validity, because it is positively asserted that the complete specification is dated more than six months after what must be considered to be the provisional specification. But I give no opinion upon the validity of the patent. If it is valid at all, the Defendant is entitled to restrain any person from manufacturing any article covered by it. If, on the other hand, it is invalid, he has no right to use these threats to the public, which are calculated, not only as to the Plaintiff, but as to everybody else, to destroy business. Many persons would immediately cease selling an alleged patented article rather than run the risk of being drawn into a litigation which might be of a very formidable character. And the utmost danger might be occasioned to the public if a man were to take out a patent for a thing notoriously of great antiquity, and by issuing circulars to monopolise a very large trade and destroy the trade of others. Therefore, I think it is of the utmost importance that this sort of threatening should be only allowed within justifiable limits.

It is argued on behalf of the Defendant that the Plaintiff has acted so as conclusively to admit the validity of the patent, as between himself and the Defendant. That question cannot be decided now. The Defendant's proper course, if he wishes to raise

that point, will be to take some proceedings to restrain the Plaintiff from disputing the validity of the patent, or by some action against him to put in issue his right to dispute it. As regards the actual notice issued by the Defendant, the terms of it are, in my opinion, wholly unjustifiable. There are two patents, one taken out in 1864 by the Defendant before the commencement of the partnership, and the other taken out in 1868, in the joint names of and with the sanction of the partners during the partnership; and though after the dissolution both partners had an equal right to use the patent of 1868, no distinction was drawn between the two patents in these notices.

It still remains to be considered whether the Plaintiff has conclusively bound himself to admit the validity of the patent. There is no doubt whatever that a man who acquires a license to use a patent cannot dispute its validity as between himself and the patentee during the currency of the license, just in the same way as a tenant is estopped from disputing the title of his landlord during the currency of his tenancy. But at the expiration of the license he is as much at liberty to dispute it as if he had never had a license at all, just as a landlord's title may be disputed by a tenant after the tenancy has expired. Now, undoubtedly during the continuance of the partnership the Plaintiff had by contract, as licensee, according to *Crossley* v. *Dixon* (1), precluded himself from disputing the validity of the patent. But the case is quite different when the license has expired, and new facts may have been since discovered which were perhaps kept carefully concealed during the partnership, such as the case here suggested as to the date of the provisional specification rendering the patent invalid. It is said that, because the Plaintiff admitted the validity of the patent during the continuance of the partnership, and asserted it, probably in good faith, he is, after the termination of the partnership, no longer at liberty to dispute its validity; and Mr. *Glasse* based an argument upon the fact of the patent being ten or twelve years old, and he relied upon the old rule of the Court never to grant an injunction till a patent had been established at law, unless it was of old date, but that if it was old, and the public had long acquiesced in the use of it, an injunction was sometimes granted

(1) 10 H. L. C. 293.

V.-C. M. 1874 AXMANN v. LUND.

pending the trial, though even in that case the validity of the patent had to be tested by an action at law.

Then the result of all this is that, in my opinion, the Plaintiff did during the partnership preclude himself from any right to dispute the validity of the patent. But after its expiration he became at liberty just as much as the rest of Her Majesty's subjects to dispute its validity, subject, however, to be answerable in damages in case the Defendant establishes the validity of the patent in any proceedings against the Plaintiff. The Defendant declines to undertake to take proceedings at law to establish the validity of the patent, and I retain the opinion I expressed in *Rollins* v. *Hinks* (1), that as he will not follow up the rights he asserts by proceeding to establish the validity of the patent, he ought to be restrained from circulating threats. I shall follow that decision, and grant an injunction against the Defendant's issuing circulars; prefaced, however, by a statement that the Defendant declines to undertake to take legal proceedings to establish the validity of the patent.

Solicitors: Messrs. *Lattey & Hart*; Mr. *S. J. Robinson.*

V.-C. M. 1874 *June* 26.

In re STRATHMORE ESTATES.

Lands Clauses Act—Notice to treat—Abandonment of part of Undertaking—Costs out of Fund.

A railway company having power to take compulsorily certain portions of an estate, served notices to treat for them. They afterwards abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into Court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions:—

Held, on a petition by the tenant for life for investment of the fund in Court, that these costs, charges, and expenses might properly be paid out of the fund before investment.

THIS was a Petition for the investment of a sum of £1087 10*s.*, which had been paid into Court by the *Hemel Hempstead and Lon-*

(1) Law Rep. 13 Eq. 355.

don and North-Western Railway Company, as the purchase-money and compensation for certain land taken by the company, and for payment of the dividends thereon to the Petitioner, Lady *Glamis*, for her life.

The pieces of land in question formed part of the settled estates of the Earls of *Strathmore* in *Hertfordshire*, which were devised by the will of the late Lord *Glamis* to the Petitioner for life, and subject thereto to the use and behoof of such one or more of the son or sons, daughter or daughters, of himself and the Petitioner, for such estates and interests as the Petitioner, notwithstanding coverture, might by deed or by her last will and testament direct, limit, and appoint of and concerning the same, with divers remainders over, under which the present Earl of *Strathmore*, the eldest son of the late Lord *Glamis*, was interested.

On the 12th of June, 1869, the *Hemel Hempstead and London and North-Western Railway Company* served notice upon the Petitioner and Lord *Strathmore* to treat for certain portions of the *Strathmore* estates in *Hertfordshire*, which they were entitled to take under the powers of some of their Acts. The company subsequently abandoned part of their undertaking, and some parts only of the land comprised in the notice to treat were actually taken. The fund now in Court represented the parts so taken.

The Petitioner had, however, before the abandonment, incurred certain costs, charges, and expenses in and about the parts of the *Strathmore* estates which were not actually taken by the company, and also in attempting to enforce payment by the company of compensation for their failure to act upon such notices to treat given by them as comprised land required for their abandoned railway; and the Petition asked that the residue of the costs, charges, and expenses not properly payable by the company might be paid out of the fund in Court.

Mr. *D. Sturges*, for the Petitioner:—

Costs were allowed out of a fund in Court under similar circumstances by Vice-Chancellor *Stuart* in *Re Aubrey's Estate* (1). This application is made with the concurrence of the Earl of *Strathmore*, though he is not made a respondent.

(1) 17 Jur. 874.

V.-C. M. Mr. *Hemings*, for the company.

1874

In re STRATHMORE ESTATES.

SIR R. MALINS, V.C.:—

I am of opinion that the order in *Re Aubrey's Estate* (1) was quite right, and I shall follow it. The case appears somewhat similar to a matter of *In re Lopes' Trusts*, which came before me on the 1st of May last, and on which I made an order similar to the one now asked for. I think, however, that the Earl of *Strathmore* should be made a co-Petitioner, and subject to this amendment the order will be made as prayed.

Solicitors: Messrs. *Western & Sons*; Mr. *G. E. Forster*.

V.-C. M.

1874

April 27, 28.

MATTHAEI *v.* GALITZIN.

[1873 M. 167.]

Jurisdiction of Court—Plaintiff and Defendant Foreigners—Contract Foreign—Subject-matter Foreign—Demurrer.

19 Eq 520
536-6

Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to a foreigner part of the profits of the mine which were claimed by the Plaintiff, by way of commission, and also for an account of profits against the company.

Demurrer allowed.

THIS case came on upon two demurrers for want of equity to a bill filed by the Plaintiff, *Julie Matthaei*, of the *Charing Cross Hotel, London*, and of *Antwerp*, in *Belgium*, widow (administratrix in *England* of *Carl Friedrich Matthaei*, formerly of *Hanover*, but a naturalised British subject, and now dead), against the Princess *Anna D. Galitzin* and the *Russian Ironworks Company, Limited*. The bill stated, that in and previously to the year 1863, *Ivan Chepeleff* and *Nicolas Chepeleff* were entitled to certain minerals and other property in *Russia*, known as the works of *Vicksa*, and having become embarrassed were desirous of getting up a company, established in *England*, for working the same.

(1) 17 Jur. 874.

In November, 1863, *Ivan* and *Nicolas Chepeleff* entered into an agreement with *Carl F. Matthaei*, then of *Hanover*, merchant, whereby they gave him powers to raise money and form a company for the purpose of developing and working the said property; and they agreed on their own behalf and that of their heirs and successors, that if the said *Carl Matthaei* should, either by establishing a company or otherwise, succeed in procuring the said property to be developed and worked to a profit to themselves, they would pay him a commission of £10 per cent. upon all moneys which should be payable to or be received by them during the whole period of such working; but it was understood that the advantage promised to the said *Carl Matthaei* was to be in force only in case he should, by means of a company, or otherwise, procure the necessary capital or funds for developing and working the property.

The said *Carl Matthaei*, acting upon the said authority and agreement, expended much time and money in endeavouring to obtain the funds necessary for working the said property, and ultimately succeeded in establishing the Defendant Company, which was incorporated in the year 1865, under the *Companies Act*, 1862, and the company obtained from *Ivan* and *Nicolas Chepeleff* a lease or grant for the working of the property for the term of thirty-seven years upon certain terms, one of which was, that the net profits to be obtained by such working should be shared between the Defendant Company and *Ivan* and *Nicolas Chepeleff*, and their heirs and successors, in the proportions of two-fifth parts thereof for the Defendant Company and three fifth parts thereof for the said *Ivan* and *Nicolas Chepeleff* and their heirs or successors to the property.

The Defendant Company had, ever since 1865, obtained large sums from working the property. The said *Ivan* and *Nicolas Chepeleff* were both dead, and the beneficial interest in the property had devolved upon the Defendant, the Princess *Anna Galitzin*, who was now entitled to three-fifth parts of the profits derived therefrom, but subject to the payment thereout of the commission under the agreement with *Carl Matthaei*.

The Defendant Company had paid to the Defendant *Anna Galitzin* considerable sums of money, amounting in the year

V.-C. M. 1874

MATTHAEI v. GALITZIN.

1872 to £43,000, or thereabouts, in respect of her three-fifth shares of the profits.

Carl Matthaei died in the year 1868, and on the 9th of February, 1869, letters of administration of his estate and effects were granted to the Plaintiff in *England*, whereby she became the legal personal representative of the said *Carl Matthaei*. The Defendant *Anna Galitzin* was now resident in *Russia*, out of the jurisdiction of this Court.

The Plaintiff had applied on several occasions to the Defendant *Anna Galitzin* for an account of the moneys she had received from the company in respect of her three-fifth shares of the profits of the working of the property, and also to pay to the Plaintiff the amount of the commission at £10 per cent. upon the moneys so received by her, but she had refused to come to such account or make such payment, and being resident in *Russia*, had, in fact, neglected to give any answer to the Plaintiff's letters or applications.

In addition to the sums already paid to the Defendant *Anna Galitzin* by the Defendant Company, there was a large sum accruing due to her in respect of her three-fifth shares in the profits of the working of the property, and the Defendant Company proposed and intended, without regard to the Plaintiff's rights, to remit to *Russia*, to the Defendant *Anna Galitzin*, the amount due to her. The Plaintiff alleged that she had no means of ascertaining what was properly payable to the Defendant *Anna Galitzin* except through the Defendant Company, and the Plaintiff had no power, except through this Court, of obtaining such information from the Defendants, or of obtaining the money payable to her.

The bill therefore prayed that the Plaintiff might be declared entitled to receive from the Defendant Company, out of the moneys payable by them to *Anna Galitzin*, a sum equal to £10 per cent. upon all the moneys already paid by the company to *Anna Galitzin*, and upon the amount now due to her from the company; and the bill prayed an account against the company of all such moneys, and that the company might be ordered to pay to the Plaintiff what should be found due to her, and that in the meantime the company might be restrained by injunction from paying to *Anna Galitzin* any of the moneys due or payable to her; and

that the Defendant *Anna Galitzin* might be restrained from receiving the same except upon making proper provision for liquidating thereout in *England* the Plaintiff's claim.

Mr. *Glasse*, Q.C., Mr. *Simpson*, and Mr. *Gill*, for the demurrer by the *Russian Ironworks Company*:—

The Court has no jurisdiction to decide this case. The question is one arising between two foreigners, and the subject-matter in dispute is foreign. The company, although it has an office in *England*, is in fact a Russian company, and the property worked by the company is in *Russia*. This point as to the jurisdiction of the Court has been conclusively decided in *Norris* v. *Chambers* (1). A director of a company established in *England* to work mines in *Prussia* had paid a large sum towards the purchase. The vendor annulled the contract, and re-sold the mines to a new company with notice, and a bill by the representative of the director to establish a lien on the estate for the advances was dismissed, on the ground that a suit between parties residing here to enforce a lien on immoveable property situate out of the jurisdiction required that some special state of circumstances should be established to enable the Court to give any relief. This was affirmed by Lord *Campbell* (2), who decided that the Court would not interfere if the subject-matter of litigation was in a foreign country where there were Courts having the means of deciding upon and enforcing the rights of the parties. There was a similar decision in *Cookney* v. *Anderson* (3), where a bill was filed to administer the trusts of a Scotch creditor's deed, under which a mining concern in *Scotland* was to be carried on by a trustee, all the parties except the Plaintiff being domiciled in *Scotland*, and a demurrer to the bill was allowed by the Master of the Rolls. That decision was also affirmed (4). Then, in *Blake* v. *Blake* (5), your Honour followed *Cookney* v. *Anderson*, and allowed a plea to the jurisdiction where the contract was entered into at *Boulogne* between the Plaintiff, who was resident there, and an Irishman, relating to property in *Ireland*.

(1) 29 Beav. 246. (3) 31 Beav. 452.
(2) 3 D. F. & J. 583. (4) 1 D. J. & S. 365.
(5) 18 W. R. 944.

V.-C. M. 1874 MATTHAEI v. GALITZIN.

Another objection is, that the Plaintiff is the representative of an agent, who is alleged to have been entitled to a commission, and the bill is filed against the lessor and the lessee to recover his commission. It is the same thing as if a house agent, entitled to a commission upon letting a house, were to file a bill against the lessor and lessee to establish his right to the commission. That is not a subject to be dealt with by a Court of Equity. The interest of the Plaintiff's husband is alleged to have been created prior to the lease; that is, by an agreement between him and the two *Chepeleffs*, the agreement being that if *Matthaei* should form a company for working the mines at a profit, the *Chepeleffs* would pay him a commission of £10 per cent. upon all moneys received by them during the whole period of the working. That being so, the lease was executed, and the inference is that the Plaintiff's husband was privy to the granting of the lease under which the company covenant to pay the moneys received, partly to the *Chepeleffs;* but the bill now seeks to restrain the company from performing the covenants in the lease to which *Matthaei* was in fact a party. Assuming that the Plaintiff has some lien upon the property, that question really depends upon Russian law, not English law, and cannot be decided by this Court.

[The VICE-CHANCELLOR:—Suppose the Princess *Galitzin* had not appeared to this bill, how could her appearance have been enforced? The company is sued to prevent them from paying money to the Princess, but suppose they do pay it, what remedy has the Plaintiff against her?]

The Plaintiff has no remedy in this country in that respect; but if the proceedings had been instituted in the Russian Courts, she would have had a complete remedy; and there is nothing to shew that she has any difficulty in asserting her rights in the Russian Courts.

The Princess not being resident here, this Court can exercise no jurisdiction over her, nor can it enforce any order made against her. The Court cannot put her in contempt, and cannot get at her property. The bill is therefore a mere *brutum fulmen;* it offends against every principle, and the demurrer ought to be allowed.

Mr. *Cotton*, Q.C., and Mr. *Kenyon Parker*, for the demurrer by the Princess *Galitzin*:—

We advance the same arguments as the company, that the Plaintiff and Defendant being both foreigners, and the property situate abroad, there is no jurisdiction in this Court.

The Plaintiff claims under an agreement entered into by her husband, to whom letters of administration were granted her in *England*, but *Matthaei* was, at the time the agreement was executed, a Hanoverian merchant, and there is nothing shewn to take the case out of the jurisdiction of the foreign Courts. It is a mere money demand, to be paid out of profits collected in *Russia*. It is governed by the case of *Mayor of London* v. *Cox* (1), where the garnishee moved to restrain a foreign attachment. In that case Mr. Justice *Willes* says (2): "The Defendant may have an answer by way of payment, or release, or discharge by the law of his own country, which he may despair of establishing according to the rules of evidence used in a foreign jurisdiction; or a bar by way of prescription, which, as being matter of procedure, will be inadmissible there. The place where he is sued may thus be all-important; and shall it depend upon the will of his debtor, who is in default, to elect for him a jurisdiction? That would be to affect *A.* by the unauthorized act of *B.*, over whom he has no control, and therefore it is not merely different from law, which a valid custom may be, but contrary to a principle of justice, which no valid custom can be."

Mr. *Cottrell* (Mr. *Higgins*, Q.C. with him), in support of the bill:—

There is nothing to prevent this Court from having jurisdiction in a case like the present. The statement in the bill describes the Plaintiff, *Julie Matthaei*, as of the *Charing Cross Hotel*. Her husband is described as a naturalised Englishman, and letters of administration were granted to the Plaintiff. The domicil of a widow is the domicil of her husband, consequently the Plaintiff is sufficiently an Englishwoman to support a bill in this Court. Then with regard to the Defendants, there is no allegation in the

(1) Law Rep. 2 H. L. 239. (2) Law Rep. 2 H. L. 268.

V.-C. M. 1874 MATTHAEI v. GALITZIN.

bill that the Princess *Galitzin* is not a British subject. Her name is no doubt foreign, but the case being now heard upon demurrer, there is nothing but the bill from which any conclusion can be drawn, and the Princess must be taken to be a British subject until the contrary is shewn. The *Russian Ironworks Company*, although having a foreign title, is undoubtedly an English company, formed under the English Joint Stock Companies Acts, and having an office in *London* for the transaction of its business. The object of the company is to work a Russian mine, but the proceeds are remitted to *England*, and are divided here among the shareholders: *In re General Company for Promotion of Land Credit* (1).

The allegation in the bill is that the company have a large sum of money out of the profits acquired by them from the working of the property, and what we seek is an injunction to restrain them from parting with that money in contravention of the agreement with *Carl Friedrich Matthaei*. We do not ask for a lien upon the rents and profits of the property in *Russia*, but we ask an account against the English company of moneys remitted to them and distributed, and of moneys now in their hands ready for distribution. We claim a right to a certain part of that money, and we ask an injunction to restrain the company from parting with it. The subject-matter of the suit, therefore, is not foreign; and the Plaintiff being a British subject, the company being English, and there being no allegation that the Defendant, Princess *Galitzin*, is a foreigner, this is the proper Court to come to for a redress of our rights, which are distinctly shewn upon the bill.

In *Maunder* v. *Lloyd* (2) and *Hendrick* v. *Wood* (3) the Court decided that it could exercise jurisdiction where the subject-matter was foreign. The former of these suits was instituted to wind up a partnership in *Hayti*, where the property was situate; and in the latter case the property was in *Jamaica*. Therefore we have authority for filing a bill to enforce this claim.

SIR R. MALINS, V.C.:—

I think it is clear upon the face of the bill that there is no right against the company if there is none against the Princess *Galitzin*.

(1) Law Rep. 5 Ch. 363; Ibid. 5 H. L. 176. (2) 2 J. & H. 718.
(3) 9 W. R. 588.

They are made parties as stake-holders, and it is said they are bound to pay the Princess three-fifths, subject only to the liability of paying the 10 per cent. commission to the Plaintiff.

If, therefore, the bill fails against the Princess, it must necessarily fail as against the company. That would be the case at the hearing of the cause. The bill, therefore, must be regarded as a bill against the Princess. What, then, are the facts? Here is a case in which the husband of the Plaintiff, who was a foreigner, entered into a contract with another foreigner respecting property situate in a foreign country. What right in such a case can there be to sue here? Can any one sue in the Courts in this country in matters relating to foreign property, the contract being foreign, and both parties foreign subjects?

Certainly, according to my view, it is no part of the business of this Court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject-matter within the cognisance of this Court. This is the case of a Plaintiff who, though now stated to be living at the *Charing Cross Hotel*, is resident at *Antwerp*; and it is admitted she is a foreign subject suing another foreign subject. If I were to overrule the demurrer and allow the suit to proceed, it would under such circumstances be useless. It would be a grievous hardship if a foreigner residing in a foreign country, and having property in that country, where there are tribunals in which the rights of subjects of that country can be asserted, could be dragged into the Courts of this country and be subjected to the annoyance of all the proceedings in these Courts. It is certainly a jurisdiction which ought not to be exercised except in cases of absolute necessity. Then arises the question whether the Plaintiff is entitled to any remedy against the Princess, and if she is not, then she is not entitled as against the company.

All the cases cited go upon the same principle—such as *Blake* v. *Blake* (1), *Norris* v. *Chambers* (2), and *Cookney* v. *Anderson* (3)—and they shew that you cannot sue a foreigner in this country,

(1) 18 W. R. 944. (2) 29 Beav. 246; 3 D. F. & J. 583.
(3) 31 Beav. 452; 1 D. J. & S. 365.

V.-C. M. 1874 MATTHAEI v. GALITZIN.

unless the parties are resident here or the property is situate in this country.

I find my opinion in *Blake* v. *Blake* (1) follows those authorities. That was a case in which the Plaintiff was a foreigner resident at *Boulogne*, and the Defendant was an Irishman, for that purpose also a foreigner, and resident in *Ireland*, for the sale of some land in *Ireland*, and the contract was entered into at *Boulogne*. A receiver of the property had been appointed by the Court of Chancery in *Ireland*, and a bill was filed in this Court asking that certain deeds relating to the property might be ordered to be given up. I find that I made these observations in that case: I had no doubt that when persons who were resident here entered into a contract, though the subject-matter of the contract was abroad, yet that the contract might be sustained; but when neither party had anything to do with this country, and the subject-matter was not situated here, as in that case, then, if the plea were overruled, the Court might as well be called upon to interfere in the affairs of all countries. Two Frenchmen might come here to have their disputes decided. *Ireland* for this purpose was a foreign country. They had a Court of Chancery of their own; and though it had been said it was not a suit to recover land, yet the effect of it was to recover an estate. I there stated that the case was, in my opinion, governed by *Cookney* v. *Anderson* (2), and the circumstances of the land being in *Ireland*, and the Defendant resident in that country, were sufficient to shew that the bill ought not to have been filed in this Court. So I say in this case, that neither the Plaintiff nor the Defendant being resident in this country, and the subject-matter not being situate here, it is a case which this Court has nothing to do with, and the demurrers must be allowed.

The last two cases which were cited—*Maunder* v. *Lloyd* (3) and *Hendrick* v. *Wood* (4)—seem to have no application; but as far as they go they are not authorities in favour of the Plaintiff, for though the parties were foreigners, the property was partly in this country.

My opinion is, therefore, that a foreigner resident abroad cannot

(1) 18 W. R. 944.
(2) 31 Beav. 452; 1 D. J. & S. 365.
(3) 2 J. & H. 718.
(4) 9 W. R. 588.

bring another foreigner into this Court respecting property with which this Court has nothing to do. This Court is not to be made a vehicle for settling disputes arising between parties resident abroad.

If the Plaintiff asks for leave to amend, it is not a case in which I should give leave.

It was stated that leave to amend was not asked, and the demurrers were, therefore, simply allowed.

Solicitor for the Plaintiff: Mr. *J. R. Bailey.*
Solicitors for the Defendants: Messrs. *Rickards & Walker.*

V.-C. B.
1874
April 17.

CREDLAND *v.* POTTER.

[1872 C. 263.]

Mortgage—Priority—Registration—2 & 3 Anne, c. 4 (Yorkshire Registry Act)—Further Charge.

A memorandum of further charge in favour of the first mortgagee of lands in *Yorkshire* requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge.

Affirmed by C. of A. 10 Ch 8

THIS was a suit by a second mortgagee of lands in a register county to redeem the first mortgagees and foreclose the mortgagor, and the question that arose was whether the Defendants the first mortgagees were only entitled to priority over the Plaintiff for the amount mentioned in their registered mortgage, or whether such priority extended to a subsequent equitable charge in their favour, unregistered but prior in date to the Plaintiff's registered mortgage.

In August, 1871, *John Capell Darlow* and *George Darlow* contracted to purchase freehold property, called the *Pinfold Close*, at *Rotherham, Yorkshire*, from *John Heptenstall*, and by indenture of the 16th of October, 1871, the property was conveyed by *Heptenstall* to them in fee. In order to pay the purchase-money the *Darlows* obtained advances from the Defendants, Messrs. *Potter & Brown*, their solicitors; and by indenture of mortgage dated the 17th of October, 1871, they mortgaged the *Pinfold Close* to *Potter & Brown* as a security for £1100, and interest thereon. The title deeds of the property were handed over to *Potter & Brown*, and the two indentures of the 16th and 17th of October, 1871, and a lease to one *Booth*, dated the 3rd of November, 1871, of a portion of the property, were on the 6th of November, 1871, registered at the *West Riding* Registry Office at *Wakefield*. The memorials, which complied with the provisions of the *West Riding Registration Act*, 2 & 3 Anne, c. 4, did not in any way refer to the nature of the deeds or the amount of consideration paid.

It appeared that, to enable the *Darlows* to complete their

purchase, Messrs. *Potter & Brown* made a further advance of £363 1*s.* 6*d.*, on the understanding that it would be repaid in a few days. On the 30th of October, 1871, this advance being still unpaid, the *Darlows* signed and handed to *Potter & Brown* the following memorandum:—

"Memorandum that Messrs. *Potter & Brown*, of *Rotherham*, attorneys, hold the deeds and writings relating to the building land in *Clifton Lane, Rotherham*, lately purchased of *John Heptenstall* by us, for securing the sum of £363 1*s.* 6*d.* (as per account) and costs, in addition to the sum of £1100 secured by a mortgage dated the 17th day of October, 1871; and we hereby undertake at any time, at the request of the said *Potter & Brown*, to execute a further charge for better securing the said sum of £363 1*s.* 6*d.* and interest thereon.

"October 30, 1871."

This memorandum was not registered.

In January, 1872, the *Darlows*, who were at the time engaged in building houses, owed the Plaintiff, who was a timber merchant, £300 for goods and materials supplied; and as he was pressing for payment they proposed to execute to him a mortgage of the *Pinfold Close* to secure payment of the amount due and further sums, upon his forbearing to take immediate proceedings against them, and continuing to supply them with timber.

Accordingly, by indenture of the 31st of January, 1872, the *Darlows* mortgaged the *Pinfold Close* (subject to the mortgage of the 17th of October, 1871, therein described as a mortgage for £1000, and the lease of the 3rd of November, 1871), to the Plaintiff for securing payment of the £363 and interest then due, and also any further sums which should be owing from the mortgagors to the Plaintiff.

During the negotiation for this mortgage Plaintiff, as he stated, was told by Messrs. *Darlow*, in answer to his inquiries, that they had mortgaged the *Pinfold Close* to *Potter & Brown* for £1000, and that this was the only sum due on the mortgage to *Potter & Brown*, and that there was no other charge or incumbrance upon the property. Before completing the mortgage the Plaintiff's solicitor searched the *West Riding* Registry Office, and obtained copies of the memorials of the deeds of the 16th and

V.-C. B. 1874 CREDLAND v. POTTER.

17th of October and the 3rd of November, 1871, but found no memorial, and, as the bill alleged, the Plaintiff had no notice of any other deed or document affecting the mortgaged property.

The Plaintiff's mortgage of the 31st of January, 1872, was registered on the 12th of February, 1872, and on the 14th of February the Plaintiff's solicitor gave Defendants *Potter & Brown* notice of his mortgage.

The Defendants wrote back (on the 15th of February): "It may be well to inform you that our charge upon the property is upwards of £1500;" and on being applied to for particulars of their claim, their answer was: "We shall have no objection to let your client have particulars of our claim under our first mortgage, provided he is going to pay it off."

The Plaintiff having failed to obtain from *Potter & Brown* any particulars as to the amount of their charge, had filed this bill for an account and redemption, charging that if the alleged subsequent mortgage for £363 in favour of the Defendants *Potter & Brown* was prior in date to the registration of the Plaintiff's mortgage, the same was under and by virtue of the Registration Acts fraudulent and void against the Plaintiff; and also charging want of notice to the Plaintiff of such alleged mortgage at the date of his mortgage of the 31st of January, 1872.

The Defendants submitted by answer that their equitable charge of the 30th of October, 1871, did not require to be registered under the Registration Acts, and took priority over the Plaintiff's mortgage of the 31st of January, 1872; and that, in any case, the Plaintiff had full and complete notice at the date of his mortgage, through his solicitor, of the further charge in their favour. In reference to this point the answer stated, "I, the Defendant, *G. Brown*, say that I am in the habit of attending in *Sheffield* almost every Tuesday throughout the year. On several occasions in the months of December, 1871, and January, 1872, or one of them, I met with the said Mr. *Mellor* in *Sheffield*, and he thereupon, as solicitor for and on behalf of the Plaintiff, inquired of me what was the amount of the claim of myself and *Potter* upon the said land. I informed him that I could not tell exactly, but that it would be upwards of £1500, besides a considerable sum for costs."

This statement was distinctly denied by the Plaintiff's solicitor, who stated that the first intimation that he had of any claim by Defendants on the property for more than £1000, was the receipt of their letter of the 15th of February, 1872, and that the first personal interview with *Brown* at which the subject of his and *Potter's* mortgage was mentioned was at the *Leeds* Spring Assizes in March, 1872.

In an affidavit in reply the Defendants reiterated the statement made in the answer, and *Potter* stated: "I distinctly recollect having a conversation with the said *G. J. Mellor* about the securities held by us previously to the date of the mortgage of the 31st of January, 1872, although I am unable to specify the exact day on which such conversation occurred. The said *G. J. Mellor* inquired of me why the whole sum due to us had not been embodied in one security, and I then informed him of the facts stated in the answer in reference to the further charge."

Mr. *Bagshawe*, Q.C., and Mr. *B. B. Rogers*, for the Plaintiff:—

Our mortgage of the 31st of January, 1872, which has been duly registered, has priority over the Defendants' antecedent but unregistered equitable charge for £363. It has been held in *Wright* v. *Stanfield* (1) that an agreement to execute a mortgage of land in *Middlesex* does not require registration under the *Middlesex Registry Act* (7 Anne, c. 20), but this decision was in effect overruled in the later case of *Moore* v. *Culverhouse* (2), in which, followed by the subsequent cases of *Neve* v. *Pennell* (3) and *In re Wight's Mortgage Trust* (4), it has been held that a memorandum of charge by deposit of deeds relating to land in a register county requires registration, and that if unregistered it will be postponed to a subsequent registered mortgage. We further submit that the Plaintiff had no notice, either express or constructive, of the existence of the Defendants' equitable charge of the 30th of October, 1871, and it is only by clear and distinct notice, raising a presumption in fact of fraud, that a registered mortgage can be postponed: *Wyatt* v. *Barwell* (5); *Chadwick* v. *Turner* (6). The

(1) 27 Beav. 8.
(2) Ibid. 639.
(3) 2 H. & M. 170.
(4) Law Rep. 16 Eq. 41.
(5) 19 Ves. 435.
(6) Law Rep. 1 Ch. 310.

V.-C. B. 1874 CREDLAND v. POTTER

onus of proving such notice, which rests upon the Defendants, has not been fulfilled, as the case set up by their answer, that distinct notice of the further charge claimed by the Defendants was given to the Plaintiff's solicitor in conversation, is wholly uncorroborated, and is distinctly denied by our evidence. The Defendants having throughout refused to render Plaintiff any account, are not entitled to any costs of suit up to the hearing: *Powell* v. *Trotter* (1).

Mr. *Kay*, Q.C., and Mr. *Henderson*, for the Defendants *Potter & Brown*:—

Our further charge, though unregistered, is entitled to priority over the Plaintiff's subsequent registered mortgage. The legal estate in the mortgaged property having been conveyed to us by a deed which was duly registered, the subsequent agreement that that legal estate should be subjected to the further debt of £363 (in addition to the £1100 with which it was already charged), was not a deed or conveyance affecting the land within the mischief of the *Registration Act* (2 & 3 Anne, c. 4), so as to require registration. All that the authorities establish is, that an equitable mortgage by deposit, where the legal estate has not been already mortgaged to the same person, must be registered; but no case will be found in which a memorandum of further charge in favour of a person who is already first registered mortgagee, and clothed with the legal estate, has been required to be registered. But in any case, the notice received through his solicitor of our further charge for £363 was sufficiently distinct to prevent the Plaintiff from obtaining priority by registering his subsequent mortgage. In searching the register he found the memorial of what purported to be an absolute conveyance of the property to the Defendants, but having obtained *aliunde* the information that this was a mortgage, and not an absolute conveyance, the Plaintiff, by omitting to inquire (either by himself or by his professional adviser), what was due to the Defendants on their security, has been guilty of such gross negligence that he must be held to be affected with knowledge of all those circumstances which but for such omission he would have acquired: *Jones* v. *Smith* (2); *Wormald* v. *Mait-*

(1) 1 Dr. & Sm. 388.

(2) 1 Hare, 43.

land (1); *Jones* v. *Williams* (2); and being affected with this knowledge he will not be allowed to take advantage of his registration to deprive the Defendants of the benefit of their security: *Rolland* v. *Hart* (3). Upon the question of costs: a mortgagee is not bound to disclose the particulars of his charge unless there is a distinct offer to redeem him, and a tender of all that is due to him.

Mr. *Bush*, for the mortgagors.

Mr. *Bagshawe*, in reply:—

The Registration Acts contemplate that any conveyance affecting the property in equity shall be registered, and it cannot successfully be contended that this instrument not under seal, by which the property is clearly affected, is not liable to registration: *Neve* v. *Pennell* (4). It is impossible to maintain that because we have notice of the first registered deed, we are therefore fixed with notice of every subsequent unregistered deed; and as to the statement in the answer that the Plaintiff's solicitor obtained in conversation with the Defendants notice of the amount due to them, it is too vague as to date to be relied upon, and may be explained by substituting for "December or January, 1871," March, 1872, as the time when it really took place.

SIR JAMES BACON, V.C.:—

The case is one of some nicety, but I am clearly of opinion that the second advance of £363 made by the Defendants was a totally distinct and separate transaction from the original mortgage of £1100, and required registration just as much as did the original mortgage. The Plaintiff, before accepting the security which was offered to him, had taken the precaution to search the registry. He there found the deeds that were registered, but no mention of this further charge. It is true that the amount of the consideration money was not referred to in the memorial which was registered, and that it is not required by the statute that it should be; at the same time I think it ought to have been referred to. The Plaintiff

(1) 35 L. J. (Ch.) 69.
(2) 24 Beav. 47.
(3) Law Rep. 6 Ch. 678.
(4) 2 H. & M. 170.

V.-C. B. 1874 CREDLAND v. POTTER.

having got notice that there was a mortgage on the property, and believing from what was told him by the mortgagor that the mortgage was for £1000 only, took a second charge upon the property, which was duly registered. Upon the evidence, which is in conflict, I do not think that the Plaintiff had any notice of the Defendants' further charge. It was not incumbent upon him to inquire of the Defendants what was the amount of their charge, and upon the law and the facts of the case I am of opinion that the Plaintiff in respect of his mortgage is entitled to priority over the Defendants' second and unregistered charge. But as there has been a want of caution on the part of the Plaintiff, it is not a case for giving him any costs.

Solicitors: Messrs. *Singleton & Tattershall*, agents for Messrs. *Mellor & Porrett, Sheffield;* Mr. *Redhead*, agent for Messrs. *Potter & Brown, Rotherham;* Messrs. *Emmet & Son.*

PAYNE *v.* EVENS.

[1872 P. 31.]

V.-C. B. 1874 *April* 18, 21.

Trustee and Cestui que Trust—Bill for Account—Lapse of Time—Negligence in omitting to keep Accounts—Costs.

The estate of a testator who died in 1832 was distributed in 1847, as the evidence shewed, at the written request of the persons beneficially entitled. Another part of the estate which fell in in 1852 was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees.

Bill, filed in 1872 by one of the beneficiaries and her husband against the surviving trustee, and the representative of the deceased trustee, for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts and vouchers, without costs.

MOTION for decree.

By a deed dated the 18th of March, 1825, it was declared that a sum of £1106 14*s.* 9*d.* New Four per Cent. Annuities, standing in the names of *John Henry Seale* and *John Boger*, should be held by them upon trust to permit *John Hamblyn Luscombe*, his executors, administrators, and assigns, to receive the dividends, interest, and proceeds to and for his and their own use, so long as he or they

should pay an annuity of £20, bequeathed by the will of his father to *Brooking Agnes Soper*, and also a legacy of £200, bequeathed by the same will, and then remaining to be paid to *Edward Luscombe Soper*, under the same will; and after the decease of *Brooking A. Soper*, and payment of all arrears of the annuity, and of the legacy to *Edward L. Soper*, upon trust that the trustees should assign the fund to *John Hamblyn Luscombe*, his executors, administrators, and assigns, for his and their own use and benefit.

In 1828 the legatee, *E. L. Soper*, attained twenty-one, and thereupon the legacy of £200 was paid by a sale of a portion of the above fund; which, by this means, and by conversion of the stock, became reduced to a sum of £906 14*s.* 9*d.* New Three per Cent. Annuities.

On the 29th of January, 1831, *John Hamblyn Luscombe* made his will, whereby, after specific bequests, he devised all the residue of his personal estate to *John Godfrey Teed*, barrister-at-law, *Deeble Boger*, and *William Hole Evens*, upon trust to call in and convert, and after payment of debts, funeral and testamentary expenses and legacies, to invest the trust moneys as therein directed, and stand possessed thereof upon trust, subject to a life estate in favour of the testator's widow, for all and every his children and child who should attain twenty-one, or being a daughter, marry under that age, in equal shares. Testator appointed the three trustees his executors.

He died on the 18th of November, 1832, and the will was proved by Messrs. *Teed* and *Evens* only, *Deeble Boger* having refused to act.

The testator, *J. H. Luscombe*, had four children, who attained vested interests, namely, *Helling Louisa Luscombe*, who married *Arthur Fleming Stack Payne*, *John Teed Luscombe*, *Sarah Hamblyn Luscombe*, who married *Arthur Rowlatt*, and *Caroline Maria Luscombe*.

Mrs. *Rowlatt* died in 1849. In 1852, the annuitant, *Brooking Agnes Soper*, died, all arrears of the annuity having been paid; and in 1862 *Caroline Maria Luscombe* died unmarried.

In October, 1871, Mr. *Teed* died, and his will having been proved by his widow and executrix, *Martha Augusta Teed*, she was now his sole legal personal representative.

On the 19th of February, 1872, this bill was filed by Mr. and

V.-C. B. 1874 PAYNE v. EVENS.

Mrs. *Payne* against *William Hole Evens* and Mrs. *Teed*, alleging that at the request of Messrs. *Teed* and *Evens*, the trustees of the fund of March, 1825, sold the £906 14*s.* 9*d.* stock, and paid the proceeds, amounting to £815 1*s.* 5*d.*, to Messrs. *Teed* and *Evens*, as executors of *John H. Luscombe;* that the testator, *J. H. Luscombe*, died seised and possessed of real and personal estate far more than sufficient to pay his debts, funeral and testamentary expenses, all of which had been long since paid, and that the Plaintiffs had from time to time received small sums on account of the female Plaintiff's fourth share in the residue; that the Plaintiffs had only recently become aware of the facts of the declaration of trust of March, 1825, and of the death of the annuitant *Brooking A. Soper;* that they had not, and neither of them had ever been paid one-fourth of the £815 1*s.* 5*d.*, and that a sum was due to the Plaintiffs in respect of other parts of the residue; and that the Plaintiffs had made friendly but ineffectual endeavours to induce the Defendants, and also *John Godfrey Teed* in his lifetime, to furnish accounts of the testator's residue, and to account for and pay to them the female Plaintiff's share in the £815 1*s.* 5*d.* The bill prayed for an administration of the testator *John H. Luscombe's* estate; that if the Defendant *Martha A. Teed* should not admit assets, that the estate of *J. G. Teed* might be administered; and that the Defendant *Evens* and the estate of *J. G. Teed* might be charged with interest upon all sums received, and not paid over by them.

The Defendant *William H. Evens*, by his answer, said that he was now in his eighty-first year, and with respect to many of the matters alleged, never had any personal knowledge; that the practical management of the trusts of the will was left almost entirely to his co-executor Mr. *Teed*, by whom, Defendant believed, all the accounts were kept, and in whose hands almost all documents relating to the trust were left. Defendant had no means of refreshing his memory by reference to any documents, except a few papers and letters. To the best of his recollection, he stated as follows:—The testator's real estate was inconsiderable. The net residuary personalty amounted to about £1600, other than the trust fund of March, 1825, which did not come into the hands of himself and his co-executor until 1855. In accordance with the trusts

of the will, a sum of about £400, part of this, was paid to *John Teed Luscombe* on his attaining twenty-one; and a portion of a similar sum was paid to *Caroline Maria Luscombe* on her attaining twenty-one; and the rest, upon her dying intestate, was divided between the female Plaintiff and Mrs. *Rowlatt*. The rest of the £1600—being about £800, representing the fourth shares of the female Plaintiff and Mrs. *Rowlatt*—was not paid to them on their attaining twenty-one, but, in the year 1845 or 1846, and in January, 1847, was, at the express request of the female Plaintiff and Mrs. *Rowlatt*, both of whom had then attained twenty-one, and were unmarried, paid to their brother *John Teed Luscombe*, and the sum, at their request, secured by his bond, and Defendant thought, also by two policies of assurance upon his life. These policies the Defendant believed were shortly afterwards, with the knowledge and consent of the sisters, allowed to drop, in consequence of *John T. Luscombe* falling into difficulties. With respect to the bond, the Defendant could give no information.

With respect to the sum of £815 1*s.* 5*d.*, which was paid over to the Defendant *Evens* and his co-executor in 1855, the Defendant said that the whole of Mrs. *Rowlatt's* share was paid to her, and "a considerable portion of such sum" was applied by him and Mr. *Teed*, at the request of the female Plaintiff and her sister *Caroline* and her brother, "in the discharge of certain debts" owing from the female Plaintiff, then unmarried, and her sister, and also of the debts owing from their mother, who had then lately died, and the rest of the sum was forthwith divided between the female Plaintiff and her sister equally. Defendant had no doubt that proper receipts were taken by Mr. *Teed*. He said that for twenty-five years prior to August, 1871, he had not received, and, so far as he knew, Mr. *Teed* had not received, any application whatever as to any part of the testator's estate, except as to the £815 1*s.* 5*d.*, when the same became divisible, or any application for accounts, or any complaint as to their conduct, or as to the management of the trust matters. He submitted whether the Plaintiffs were not bound to account for the serious and unreasonable delay for which they alone were responsible, and which had made it so difficult for himself and his co-Defendant to meet the case set up by the bill; and submitted that such delay had, under the circumstances, dis-

V.-C. B. 1874 PAYNE v. EVENS.

entitled the Plaintiff to any part of the relief prayed against him or the estate of Mr. *Teed*.

Mrs. *Teed* answered by stating her entire ignorance of the matters alleged.

From the evidence it appeared that, after the bond had been given by *John Teed Luscombe*, he became a bankrupt, and the bond was rendered worthless; but that the Plaintiff sued her brother on the bond.

The statement that Mrs. *Rowlatt* received her share of the £815 1*s.* 5*d.* was shewn to be erroneous, she having died in 1849.

A letter of authority, dated the 5th of January, 1847, addressed to Messrs. *Teed* and *Evens*, as executors of *J. H. Luscombe*, signed by Mrs. *Luscombe*, the widow, and *H. Louisa Luscombe* and *Sarah H. Luscombe*, requesting them to sell out the fund then standing in their names, and pay the same to *John Teed Luscombe* on receipt of a bond from him, and the amount already advanced by them to him, was produced in evidence.

A copy of entries from April to July, 1855, in the ledger relating to the account formerly kept by the Defendant *Evens* with *Bulteel & Co.*, bankers of *Plymouth*, was also produced. Defendant said it was the only detailed statement which he could render or produce or procure with respect to the application of the £815 1*s.* 5*d.* He explained that two sums of £100 and £10 drawn in favour of "self" were spent in paying small bills; and that a sum of £203 9*s.* in the name of *Teed* represented the share of Mrs. *Rowlatt*, deceased, which was paid to her husband and representative.

John Teed Luscombe made an affidavit for the Defendants. He said that Mr. *Teed* was the acting executor; that soon after 1844 he, the deponent, borrowed £500, and in October, 1846, £300 more from the trustees; that the loans were made with the consent of Mrs. *Payne*, Mrs. *Rowlatt*, and his mother; that the policies were allowed to drop; that the £815 1*s.* 5*d.* was divided into fourths, one of which was paid to Mrs. *Rowlatt*, and the other three applied in payment of debts of the family, who then lived all together. He recognised many of the names in the copy of the ledger produced as those of shopkeepers at *Plymouth* at that date.

Mr. *Swanston*, Q.C., and Mr. *Freeman*, for the Plaintiffs:—

The rule is clear that trustees who neglect to account must pay the costs to the hearing: *Springett* v. *Dashwood* (1); even where the account is substantially correct.

Here it is plain from the Defendant's own evidence that the Plaintiffs' share was swept away in payment of debts for which the female Plaintiff was not liable; and the securities that were taken were absolutely worthless. Breaches of trust committed by relatives are always viewed by the Court with especial displeasure.

Mr. *Kay*, Q.C., and Mr. *Badcock*, for the Defendant *Evens*:—

Every presumption is made in Courts of Equity against a stale claim. If the evidence is not of the best kind, it is precisely owing to the staleness of the claim. Here the testator died in 1832, and the bulk of the property was distributed so long ago as in 1847.

As to the whole of the property except the £815, written authority is produced: and the Plaintiff actually sued her brother on the bond.

The letter was procured by the brother, not by the trustees of the fund; and it was impossible for the executors to refuse to act on the request.

Knowing of the bankruptcy of the brother, the Plaintiffs make no claim until after Mr. *Teed's* death.

Mr. *Jackson*, Q.C., and Mr. *Thomas Lean Wilkinson*, for the Defendant Mrs. *Teed*.

On the question of presumption, they referred to *Lewin* on Trusts (2); *Pattison* v. *Hawksworth* (3).

Mr. *Swanston*, in reply.

SIR JAMES BACON, V.C.:—

It must be admitted that this is a very singular case, and in my experience I do not recollect one like it. No doubt the Court acts with strictness and rigour against trustees, because it requires for the public interest that the duties assumed by trustees should

(1) 2 Giff. 521. (2) 4th Ed. 567.
(3) 10 Beav. 375.

V.-C. B. 1874 PAYNE v. EVENS.

be discharged with the utmost punctuality and regularity. When trustees have failed in these duties, and wrong has been done in consequence of that failure, the Court is in the habit of visiting the trustees with severity; but I never heard of a case in which, after such a lapse of time as has taken place here, and after such transactions as are here clearly proved, the rule against trustees has been applied as if they were still trustees, still holding in their hands funds, and still liable to account.

In the year 1832 a testator dies leaving a widow and four children. The property is collected, as appears by the answer of the Defendant, which is not questioned, and it consisted of a sum of about £1600, divisible into fourths among the children. Two of the children received their shares—that is clear—*John Teed Luscombe* and another. There remained a sum of £800 invested in the funds. At that time—I speak now of the year 1847, when the present Plaintiff was adult, when she was living with her mother and her grandmother, and when she had the protection of her uncle, the late Mr. *Teed*—a sum of £800 was ascertained to be the sum to which she and her sister, and her mother for a life interest, were entitled—that and no other; and I think it would be against all the rules which the Court has applied to the doctrine of presumption to presume anything but that at that time the estate was administered, all that could be realised was realised, and £800 of stock was all that the Plaintiff could claim to have any interest in. Well, that £800 is dealt with, as appears by the evidence, in the plainest and most distinct manner. The family were desirous that *John Teed Luscombe*, who was then a young man beginning business, should have the benefit of that sum. He had borrowed £500, and he wanted £300 more, which would exhaust the fund. The trustees were asked to advance it. Mr. *Teed*, who, as we all know, was a lawyer, pointed out the difficulties of advancing the trust money to *John Teed Luscombe* upon personal security, and that it could not be done except with the consent and at the request of the persons entitled, and that consent accordingly was readily given. The evidence of this is in writing, and it is one of the most satisfactory pieces of evidence ever produced. The security taken for it was that which the Plaintiff herself prescribed—namely, a bond. She takes the bond;

she sues upon it; she does not get the money, as it happens, by the failure of her brother, but she treats that £800 as a payment made by her direction to *John Teed Luscombe*, for securing the repayment of which she took a bond. That was in the year 1847, and there is no suggestion that from that time any single item or fraction of the testator's estate, of which estate Mr. *Evens* is the surviving trustee, was in existence. No application is made in respect of it until the institution of this suit, and yet I am asked to presume that, because one trustee has not now forthcoming accounts and vouchers, he has committed that default which this Court visits, when the trustee withholds his accounts, or does not present them at the proper time, not only with liability, but by making him pay the costs up to the hearing. There was never such a case presented to the Court, and so to hold would be in direct violation of the rules always acted upon, and directly opposed to everything like common honesty—I had almost said common decency.

The bill is filed asking for two things—general administration of the estate, and relief in respect of a sum of £815, which are subject to separate considerations. The bill makes scarcely the slightest allusion to the general estate, stating, in the way of pleading only, that the testator died leaving enough to pay all his debts, that they have been paid, that the Plaintiffs have from time to time received from the executors of the will small sums on account of one fourth share to which the Plaintiff, Mrs. *Payne*, became entitled under the will, and then it asks that the real and personal estate of the testator may be administered. When the answer is put in a totally different state of circumstances is presented. The winding-up of the general estate is stated in the answer, and is, I think, sufficiently proved so that the Court can act upon it. There is no amendment of the bill. There is not one word said about the £800 stock, which was a part of the general estate. The bill undergoes no amendment that I know of, but it stands upon the answer with a full and distinct explanation of the transaction as to that £800, the stock for which the bond was given.

Then the other thing to be considered is this trust sum, as unquestionably it was, of £815, which in 1855, by the death of an

V.-C. B. 1874 PAYNE v. EVENS.

annuitant, became distributable, and to a share in which the Plaintiff was entitled. Upon that subject there is a piece of evidence which is as satisfactory, or perhaps more so, than anything else in the case—I mean the evidence of *John Teed Luscombe*. Mr. *Teed* is dead. The bill is not filed until after Mr. *Teed's* death. During his lifetime, as he had, it is clear, the principal management of this affair, information might have been given which now it is impossible to arrive at. But Mr. *John Teed Luscombe* says this: "I have been familiar with the matter of this trust for many years. Mr. *Evens* was an acting trustee, as was also Mr. *John Godfrey Teed*, who I have no doubt was consulted by Mr. *Evens* in everything he did as trustee." Then he says: "No step was taken in the affairs without consulting Mr. *Teed* . . . I was admitted a solicitor in Michaelmas Term, 1844, and soon after my admission I borrowed from the trustees £500, and in October, 1846, a further sum of £300. These loans were made with the consent of the Plaintiff, Mrs. *Payne*, one of my sisters, of Mrs. *Rowlatt*, my other sister, and also of my mother, Mrs. *Luscombe*." Then he says it was secured by two policies of insurance and his own bond, and that is all he says upon that subject. But as to the £815 he says this—that it "was received by the trustees in 1855. The dividends of the stock afterwards sold, and which produced this £815 1*s*. 5*d*. cash, were applied in payment of the annuity of £20 to Mrs. *Soper* during her life, and the surplus was paid to my mother. After Mrs. *Soper's* death the whole of the dividends were received by my mother, and the £815 1*s*. 5*d*. was received by the trustees after my mother's death in 1855." [The Plaintiff says she did not know of the death of Mrs. *Soper*.] "It was divided into four shares—one was paid to Mr. *Rowlatt*, and the remaining three-fourths were applied in payment of certain debts due at *Plymouth*, with my consent and the consent of the Plaintiff and my sister *Caroline*, who is now dead. These were debts owing from the family. My mother, grandmother, and my two sisters, Mrs. *Payne*, who was then unmarried, and *Caroline*, kept house in *Plymouth* together. The Plaintiff herself (Mrs. *Payne*) told me that she received a portion of this three-fourths, which I understood at the time was the balance left after payment of these debts. Mrs. *Payne* has since expressed her regret that the money was so applied.

The payments were made by cheques. Some of the payments I made myself. There was one cheque for £100 drawn by Mr. *Evens* in favour of 'self,' which I have no doubt was applied in payment of the claims of smaller creditors, and in the payment made to Mrs. *Payne*. The account at the bank was in Mr. *Evens*' name. I handed cheques for the amounts due to *Hicks*, *Radford* and *Pollard*, appearing in the second column of Exhibit D to the aforesaid affidavit. On looking at the said column I recognise the names of persons with whom my mother's family dealt, namely, *Shepheard*," &c. (Then he gives them.) "My mother and sisters were in narrow circumstances in *Plymouth*. The Plaintiffs have always been in needy circumstances." It cannot be disputed that the facts stated in that deposition which I have been reading are strictly and clearly in evidence. The Plaintiff herself calls Mr. *John Teed Luscombe* to make an affidavit, and in that affidavit he qualifies in some degree what he had said about the loan of £500. He says, "I am not aware whether the loan of £500 from Messrs. *Teed* and *Evens*, the trustees of my late father's estate, to myself in 1844, was made with the written consent of the Plaintiff *Helling Louisa Payne*, but I understood that it was made with her consent. As to the £815 1*s*. 5*d*. received by the trustees in 1855, I consented for my share thereof to be applied in payment of certain *Plymouth* debts due from my grandmother and mother. I understood that the Plaintiff Mrs. *Payne* also consented for her share to be similarly applied, and that she received some small balance; but this she has since denied" (when, he does not suggest). "I do not believe any written consent was ever taken from any one."

Then he says: "As to the cheque for £100 drawn by Mr. *Evens* in favour of 'self,' I do not know how this was applied; although I was informed by him that it was applied in payment of small debts of my grandmother and mother, as stated in my depositions, but he stated he had no receipts. The Plaintiff Mrs. *Payne*, so far as I know, never had any account whatever from the trustees as to the application of the £815 1*s*. 5*d*., and I do not believe any account was ever rendered to her until after the institution and during the progress of the suit. Mr. *Teed* made an allowance to his mother, but which was not regularly paid, and which was, I believe, considerably in arrear at the time of my mother's death;

V.-C. B. 1874 PAYNE v. EVENS.

and this was the cause of some of the *Plymouth* debts being unpaid in April, 1855."

Now I have to deal with that as evidence; and upon this statement of a member of the family, who was himself cognizant of all that had taken place in the administration of this estate, can I hesitate to believe that it is sufficiently proved, so as to defeat any claim now made by the Plaintiff, that the £815 was applied duly? I say "applied," because it was applied with Mrs. *Payne's* consent, though she has some doubt whether it was applied in such payment as appears by the evidence; and then *John Teed Luscombe*, who knows well enough that it was applied in payment of the debts which had been contracted in the common housekeeping of the grandmother, the mother, and the two daughters (although he afterwards says in his affidavit that they were debts due from the mother and grandmother), states that which, in my opinion, strengthens the presumption extremely, namely, that the family were all in narrow circumstances, all in great need, and all pressed by their creditors; and that if the £815 had not been applied as it was, it would have been much the worse for all of them. That part of the case is clearly and satisfactorily proved for the purposes of the suit.

Then I have to deal with the question of what presumption ought now to be drawn in a case of this sort? It is impossible to presume otherwise than that from 1847 the Plaintiff was satisfied that, by getting the bond, she had her full share of her father's estate as far as it was then administered. As clearly is it proved by *John Teed Luscombe*, who is her own witness for certain purposes, although the affidavit speaks more faintly than the deposition does, that the £815 was duly applied as to the share of Mrs. *Rowlatt*. There is no doubt about it. As to the rest, it is proved as well as at this distance of time it can reasonably be required to be proved; and under these circumstances I am asked, after this lapse of time, to take an account that must begin in the year 1832, forty years ago; and further, of an estate which I am satisfied ought to be presumed to have been wound up and settled at least in the year 1847; and I am asked to direct a more special account as to the £815, in the face of the female Plaintiff's own evidence that the £815 was for paying debts as to which, if she was not liable, she was mainly interested; and I am asked to do that at

the suit of a Plaintiff who was married in 1857, the money having been lent in 1847, and the bill not being filed until after Mr. *Teed*, who was the only person who really managed this matter, or could give satisfactory evidence upon the subject, is in his grave. A more unreasonable and unjust demand than that which is preferred by this suit never was presented to the Court, and I think the bill must be dismissed.

I cannot, however, dismiss it with costs, but only for this reason, that although I am satisfied as to the transaction of 1855, and satisfied that the presumption is in favour of the Defendants, yet I cannot say that it was not the duty of the trustees to preserve evidence of that distribution in 1855; and as they have neglected to do that, unfortunate as it is for them, I cannot compel the Plaintiffs to pay the costs of that negligence which alone has allowed colour to be given to the institution of this suit.

Solicitors for the Plaintiff: Messrs. *Makinson & Carpenter*, agents for Mr. *Burrow, Collumpton.*

Solicitors for the Defendants: Messrs. *Vizard, Crowder, & Anstie*, agents for Mr. *W. F. Burrell, Gosport;* Messrs. *Sharp & Ullithorne.*

V.-C. H.
1874
April 16.

TOMLIN *v.* BUDD.

[1874 T. 34.]

Railway Company—Power to let for Terms—Sale—Metropolitan District Railway Act, 1868.

The *Metropolitan District Railway Act*, 1868, gives the company unrestricted powers of sale over their lands not actually used for the railway.

IN 1865, the *Metropolitan District Railway Company* purchased from *Robert Gunter* a parcel of land under the powers contained in their Act (27 & 28 Vict. c. cccxxii.), for the purposes of their railway.

By a subsequent Act, 31 & 32 Vict. c. cviii., the company acquired further powers of dealing with land and houses so acquired. By that Act, after reciting "that whereas, for the purpose of constructing their railway and works, the company had become owners of lands, houses, and buildings erected over the railway or immediately adjoining thereto, or otherwise connected with the structure of the railway, and other property in similar circumstances may hereafter belong to the company, and it is expedient that the company should maintain control over such property, and that the provisions hereinafter contained should be made with relation thereto," it was enacted by sect. 15 (noticed in the margin thus, "as to certain superfluous lands"), that "the following provisions shall apply to any lands or buildings now or hereafter acquired by the company, adjoining to or built over the railway or works of the company, and in any way connected with the structure of their railway and works, and the site thereof not actually used for the purposes of the railway, and shall apply also to any yards, gardens, or premises attached to such lands or buildings, and the same lands, buildings, yards, gardens, and premises are in this section referred to as the premises.

"1. The company may hold and let the premises, and may grant leases of the same for any term they may think fit.

"2. The premises shall not be deemed part of the undertaking of the company charged with the general mortgages or debenture

stock thereof, excepting such portion of the mortgages as may be expressly charged upon the premises or upon any specific portion thereof.

"3. The company may from time to time borrow on mortgage of the premises any sums of money, and the only security shall be that portion on which the mortgage is charged.

"4. Nothing contained in this enactment shall be construed to alter any of the provisions in the Acts relating to the company, or agreements by them which require resale or reconveyance of the premises to any person specifically named, or shall affect the provisions between the Marquis of *Westminster* and the company or the said section in the Act of 1866, as to the freehold estate of the Marquis."

On the 6th of December, 1871, one *Mathew Scott* agreed with the company to build sixty houses on a part of the land so acquired by the company from *Gunter*, in 1865, according to certain specifications, at rents amounting to £300 per annum. It was also by the agreement stipulated that *Mathew Scott* should have the option, within two years from that date, of purchasing the fee simple and buildings at a sum not exceeding twenty-five years' purchase on £300 rental, provided notice should be given of his intention before the expiration of the two years.

By an indenture dated the 20th of December, 1871, the land and messuages now in question, with others, were mortgaged by the company to one *Charles Morrison*, to secure £60,000. *Mathew Scott* erected eleven tenements on that piece of land now in question and which formed a part of the land acquired in 1865, and the company granted him four leases of the eleven messuages. *Scott* subsequently, within the time fixed, gave notice of his intention to purchase the premises in pursuance of the provision in the agreement of the 6th of December, 1871. *Scott* subsequently agreed with the Plaintiff to sell him the benefit of the contract, and by an indenture dated the 30th of November, 1873, made between *Morrison* (the mortgagee) of the first part, the company of the second part, *Scott* of the third part, and the Plaintiff of the fourth part, the parties of the first, second, and third parts conveyed the hereditaments to the Plaintiff with a reservation to the company of full liberty to enter on a part of the land coloured blue on the map,

V.-C. H. 1874 TOMLIN v. BUDD.

with their engineers and workmen, to do whatever works might be necessary for the railway. The leases, by an arrangement between the lessors and purchasers, were subsequently merged in the inheritance. By an agreement in writing executed in duplicate, the 29th of November, 1873, the Plaintiff agreed to sell and the Defendants to buy, for the sum of £2025, the fee-simple and inheritance, free from incumbrance except leases, of that parcel of freehold land situate on the north side of *Earl's Court Gardens, South Kensington*, together with the eleven houses thereon, numbered 15 to 25, both inclusive, which had been erected by *Scott* on a part of the land comprised in the purchase by the company from *Gunter*, in 1865, and delineated on the plan annexed thereto. The conditions were in the usual form, the title being stipulated to commence with indentures of lease and release dated the 27th and 28th of December, 1805, between the parties named therein, the purchasers being bound to assume that the parties purporting to convey were seised in fee simple of the premises comprised therein.

The abstract of title was delivered in due time, as were also certain requisitions made by the Defendant's solicitors; and it was admitted that, except the first, all were answered satisfactorily.

The first requisition was as follows:—

"The mortgages made by the *District Railway Company* state that the land in question is within the operation of sect. 15 of the Act of 1868, and the land is so dealt with by the company. It is difficult to see how any land within the operation of this section can be surplus land; and if it is not surplus land we are unable to see how the company can have power to sell it. If, on the other hand, it were not within the 15th section, but mere surplus land, then unless it can be shewn that the land was situate in a town within the meaning of the cases upon the subject when the company purchased, the vendor must prove that proposals for sale have been made to the adjoining proprietors."

The Defendant subsequently waived all this requisition, except that part which is founded on the land not being surplus land.

The Plaintiff ultimately filed this bill, praying for specific performance of the agreement, to which the Defendants filed a general demurrer.

Mr. *W. Pearson*, Q.C., and Mr. *Smart*, for the demurrer:—

These are not superfluous lands, and if they were, the power of disposition by the company has been taken away by the Act of 1868.

By the general law a company is empowered to acquire land for the purpose of making and maintaining the railway and works. The lands required for the railway and works they are bound to retain, and all other lands were superfluous. Unless the company can sell these lands under the 127th section, they cannot sell them at all under the *Lands Clauses Consolidation Act*; and if they are superfluous lands the company are bound to proceed under the 127th and 128th sections of that Act. Such was the old law; then comes the Act of 1868, which relieves the company from the obligations imposed by the 127th and 128th sections of the *Lands Clauses Consolidation Act*, by permitting them to hold and let, but it gives no authority whatever to sell.

This demurrer must therefore be allowed.

Mr. *Dickinson*, Q.C., and Mr. *Jolliffe*, for the bill, were not called on.

SIR CHARLES HALL, V.C.:—

The first observation that occurs is, that these lands are described and dealt with by the Act of 1868 as superfluous lands. Generally, after a cutting is made, there is a margin of superfluous lands which may not be necessary in order to maintain the railway and works. The 15th section of the Act of 1868 authorizes the company to hold or let these lands for a long term of years, which it was assumed, without parliamentary power, they could not do, but the Act does not compel them to do so. There is nothing in the Act of 1868 to take away the power of sale, though it relieves the company from the obligations imposed upon railway companies by the 127th section of the *Lands Clauses Consolidation Act*.

Independently of the Act I think the company might alienate the land for a long term of years. This is unlike retaining property

V.-C. H. 1874 TOMLIN v. BUDD.

for a purpose different from that authorized by the Legislature. The effect of the Act of 1868 being to relieve the company from the obligations imposed by the *Lands Clauses Consolidation Act*, is to confer upon them unrestricted powers of sale. This demurrer must therefore be overruled.

Mr. *Dickinson*:—With costs?

The VICE-CHANCELLOR:—Yes, to strengthen their title.

Solicitor for the Plaintiffs: Mr *F. J. Thairlwall.*
Solicitors for the Defendant: Messrs. *Budd & Co.*

Ex parte WILLIAMS. *In re* WILLIAMS.

C. J. B.
1874
May 4.

Composition—Second Meeting—Right of Creditor who has proved to withdraw his Proof—Bankruptcy Rules, 1870, *r.* 273.

A debtor filed a liquidation petition, and at the first meeting the creditors resolved to accept a composition. At the second meeting a creditor, who had proved his debt at the first meeting, and had voted, but who had since been advised that his proof was not in a proper form, and that it might affect his right to a security which he had, expressed a wish to withdraw the proof and not to vote. No objection was made, and he did not vote. The meeting was adjourned, and at the adjourned meeting the creditors resolved upon a liquidation by arrangement:—

Held, that Rule 273 applied to the case, and that the creditor was entitled to have his proof taken off the file.

THIS was an appeal from a decision of the Registrar of the *Aylesbury* County Court, acting as Judge.

Richard Craft Williams, a farmer at *Amersham*, filed a liquidation petition in January, 1874.

Under the will of his father he was entitled, in the event of his surviving his mother, *Mary Williams*, to a share of the residue of his father's estate. In the event of his dying before his mother the share was given by the will to his children. The trustees of the will were *Mary Williams*, *George Williams*, a brother of the debtor, and *Edwin Birch*. In the year 1872 the three trustees made advances to *R. C. Williams*, on account of his contingent interest, amounting to £459.

The first meeting of the creditors under the petition was held on the 7th of February, 1874. *George Williams* attended this meeting, and tendered a proof which stated that *R. C. Williams* was indebted to him and to *Mary Williams*, his co-trustee under his father's will, in the sum of £509 16*s.*, for money lent and advanced by him and *Mary Williams*, and interest thereon, for which sum he deposed that no satisfaction or security whatsoever had been received This was intended to be a proof for the £459 advanced as above and interest thereon, but it was made without the knowledge of *Birch*, the other trustee. The creditors present unanimously resolved to accept a composition of 10*s.* in the pound, and that the

C. J. B.
1874
Ex parte WILLIAMS.
In re WILLIAMS.

second meeting should be held on the 17th of February. Before that day arrived *George Williams* had been advised that his proof was not in a proper form, and that it might affect the right of the trustees of the will to retain the advances out of the share of *R. C. Williams* when it became payable. He attended at the second meeting, and expressed a wish to withdraw his proof and not to vote. No objection was made to this course, and he accordingly did not vote. The creditors resolved to adjourn the meeting to the 17th of March. On the 17th of March the adjourned meeting was held, and the creditors then resolved upon a liquidation by arrangement. *George Williams* did not attend this meeting. On the 2nd of April he applied to the Court to have his proof taken off the file. This application was refused by the Registrar. *George Williams* appealed.

Mr. *Robson*, for the Appellant, relied upon rule 273 (1) of 1870.

Mr. *Bagley*, for the trustee under the liquidation.

SIR JAMES BACON, C.J.:—

I think that according to Rule 273 the Appellant was entitled to withdraw his proof at the second meeting. He has given a very good reason for his wishing to do so. The proof must be taken off the file. But the Appellant must pay the costs of the application to the County Court, and also the costs of the appeal, for it is his own blunder which has rendered the proceedings necessary.

Solicitors for the Appellant: Messrs. *Allen & Edwards*, agents for Mr. *H. Bedford, Amersham.*

Solicitors for the Trustee: Messrs. *Denton, Hall, & Barker*, agents for Messrs. *J. & C. Cheese, Amersham.*

(1) Rule 273: "Where any creditor shall desire to retire from any meeting, and not to be considered as present, he may withdraw his proof without prejudice to his again proving his debt on any subsequent occasion."

Ex parte BOSS. *In re* WHALLEY.

C. J. B.
1874
May 25.

Debtor's Summons—Bankruptcy Petition—Offer of Debtor to pay—Creditor's Right to Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 9, 80, *sub-s.* 10.

After a bankruptcy petition has been presented, and before adjudication, the petitioning creditor is not bound to accept payment, although, *semble*, he is at liberty to do so, but is entitled to insist upon an adjudication on proving his debt and the commission of an act of bankruptcy; and this as well in the case of an act of bankruptcy under a debtor's summons as in any other.

3 Ch D. 453.
— 462.
4 Ch D 350
15 Ch D 458
463
24 Ch D 40

THIS was an appeal from a decision of the Registrar of the *Wrexham* County Court, acting as Judge.

On the 3rd of November, 1873, a debtor's summons was issued by Mr. *Albert Boss* against Mr. *Hampden Whalley* (a non-trader), claiming the payment of £75 9*s.* 6*d.* for principal and interest due upon a bill of exchange accepted by *Whalley*. The summons was served personally upon *Whalley*, and he committed an act of bankruptcy by not paying the sum claimed, or securing or compounding for it within twenty-one days. On the 29th of November, 1873, *Boss* presented a petition for adjudication of bankruptcy against *Whalley*. The debt alleged in the petition was the sum claimed by the debtor's summons, and the act of bankruptcy alleged was the failure to comply with the summons. On the 13th of December an order was made by the County Court for substituted service of the petition, on the ground that *Whalley* was keeping out of the way to avoid service, and the 2nd of February, 1874, was fixed for the hearing of the petition. On the 3rd of February, 1874, on the application of the petitioning creditor, the day for the hearing of the petition was postponed to the 31st of March. Negotiations had been going on between *Boss* and the father of the debtor (who was a young man about twenty-two years of age) for the payment of the debt claimed. On the 31st of January, 1874, a clerk of the debtor's solicitor went to the office of the solicitors of *Boss* and offered to pay the amount claimed with interest and costs. Both the partners in the firm were then absent, but one of them, later in the same day, called

C. J. B. 1874 *Ex parte* Boss. *In re* Whalley.

at the office of the debtor's solicitor, and asked whether he was prepared to pay the amount of some other bills accepted by the debtor and held by *Boss*, as well as the sum mentioned in the petition. To this inquiry the clerk of *Whalley's* solicitor answered that his instructions had reference only to the pending proceedings. *Boss's* solicitors thereupon declined to accept the tendered payment, and said that as an act of bankruptcy had been committed their client would insist upon an adjudication being made, unless the claims he had in respect of the other bills were satisfied. On the 31st of March the petition came on to be heard. Evidence was given of the petitioning creditor's debt and of the act of bankruptcy, and an adjudication was asked for, and the Registrar was informed that there were other debts due from *Whalley* to *Boss* besides the debt mentioned in the petition. *Whalley's* solicitor offered to pay the debt mentioned in the petition and costs. The Registrar thereupon made an order that, on payment to *Boss* within one month of the £75 9*s.* 6*d.* with interest, together with the taxed costs of the proceedings in bankruptcy, the petition be dismissed, and all further proceedings thereon be stayed. From this order *Boss* appealed.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

Under sect. 8 of the *Bankruptcy Act*, 1869, the petitioning creditor has a right, *ex debito justitiæ*, to an adjudication, upon proof of a debt of not less than £50, and of the commission of an act of bankruptcy by the debtor within six months: *Ex parte Claxton* (1). He is not bound to state on his petition every debt which is due to him from the debtor. It is sufficient that the requisites for an adjudication exist when the petition is presented: *Ex parte Douthat* (2). In *Ex parte Burnett* (3) it was held that a joint creditor who had sued out a separate fiat was entitled to receive dividends on his joint debt out of the separate estate *pari passu* with the separate creditors, notwithstanding the fact that there was also due to him from the bankrupt a separate debt sufficient to support a fiat. In *Ex parte Thompson* (4) a creditor, who, upon

(1) Law Rep. 7 Ch. 532.
(2) 4 B. & A. 67.
(3) 2 M. D. & D. 357.
(4) 1 Ves. 157.

receiving his debt, superseded a commission without application to the Court, was ordered to refund. Upon the same principle, in *Davis* v. *Holding* (1), an agreement between a petitioning creditor who had sued out a fiat and the bankrupt, that the former should abandon the prosecution of the fiat on certain terms, was held to be illegal and void. A bankruptcy petition is a proceeding for the benefit of all the creditors of the person against whom the petition is presented: *Ex parte Jay* (2).

Mr. *Winslow*, Q.C., and Mr. *E. Cutler*, for *Whalley*:—

Why cannot the debtor pay and the creditor receive the debt at any time before an order for adjudication is made on the petition? The only act of bankruptcy alleged is non-compliance with a debtor's summons, an act of bankruptcy of which only the summoning creditor can avail himself: *Bankruptcy Act*, 1869, s. 6, sub-s. 6. The Legislature, when it passed that Act, at the same time abolished arrest for debt, and it extended the summary procedure, by way of debtor's summons, to all persons, it having been originally applicable only to traders. When payment of the debt mentioned in the petition was tendered the creditor had no right to insist on an adjudication. Sect. 8 of the Act gives the Court a discretion to dismiss the petition; and, by sect. 9, if the debtor disputes the debt the Court may stay proceedings pending the trial of an action at law, upon security being given "for payment to the petitioner of any debt which may be established" against the debtor. What would be the use of this provision, if the argument on the other side is sound, that after the petition is presented the debtor cannot pay and the creditor cannot receive the debt? The Court is bound to stay the proceedings if the debt is disputed. Why is the debtor at liberty to pay the debt in that case, but unable to pay it if he does not dispute it? If that be so, he would only have to swear the debt was not due, and then when an action was brought to try the question he could consent to a judgment against him and pay. The *Bankruptcy Rules*, 1870, rr. 43, 44, refer only to the debt mentioned in the petition, and the form of "Bond on stay of proceeding" (No. 19 in the Schedule to the *Bankruptcy Rules*, 1870) only

(1) 1 M. & W. 159. (2) Law Rep. 9 Ch. 133.

C. J. B. 1874 *Ex parte* Boss. *In re* Whalley.

provides security for payment of the particular debt claimed in the petition or debtor's summons. In *Ex parte Jay* (1) a receiver had been appointed, and that was the ground of the decision. The judgment of Lord *Selborne* is quite in accordance with our contention. The judgment of Lord Justice *Mellish* in *Ex parte Wier* (2) implies that a creditor whose petition is founded on a debtor's summons may receive payment of his debt after the petition is presented. In the present case the first tender was made before the petition was served, and the debtor had a right to insist on the creditor receiving the money. In *Ex parte Sturt & Co.* (3) your Honour said: "Former Acts of Parliament relating to bankruptcy are mere matters of history, and are swept entirely away by the present Act." By sect. 80, sub-sect. 10, of the present Act, the Court may at any time stay proceedings in bankruptcy on proof of any sufficient reason for doing so, and on such terms as it may think just. *Ex parte Burnett* (4) has no application to the present case.

Sir James Bacon, C.J.:—

I am of opinion that the view taken in the Court below was not the correct one. The case is an extremely simple one. A petition for adjudication is presented by a creditor who had previously issued a debtor's summons for a debt larger in amount than £50. That is how the proceedings are launched. It is incumbent upon the creditor to shew that not less than £50 is due, but there is no law which prevents him from shewing that a much larger debt than the amount mentioned in the petition is in fact due to him. So the matter stands; the evidence of the service of the debtor's summons appears to be complete (I have heard no suggestion to the contrary), and, as a consequence, the act of bankruptcy was complete at the expiration of the period limited by the statute for a debtor to pay, secure, or compound the sum specified in the debtor's summons. For various reasons, the hearing of the petition was adjourned until the day when the order now under appeal was made. Upon the hearing the creditor desired that an order of adjudication should, on the grounds specified in the 8th

(1) Law Rep. 9 Ch. 133.
(2) Ibid. 6 Ch. 875, 880.
(3) Law Rep. 13 Eq. 309.
(4) 2 M. D. & D. 357.

section, be made. That section prescribes that, "At the hearing the Court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with such proof, shall adjudge the debtor to be bankrupt." Can anything be more clear and distinct than that? It is the right of the creditor, upon proving those requisites—his debt and the default in payment, which constitutes an act of bankruptcy—to call for an adjudication. The section goes on to provide: "The Court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence, or for any other just cause, or may dismiss the petition, with or without costs, as the Court thinks just." That means that if the Judge is not satisfied with the evidence, he may adjourn the hearing, or he may dismiss the petition, such an order, like all other orders, being the subject of appeal. It has been argued very forcibly that, as the law now stands, it is competent for a creditor to receive the debt in respect of which he attacks the debtor, and be free from all the penalties and liabilities which formerly attached to his doing so. This may be true, but there is nothing in the Act of 1869 or in the policy of the law which renders it incumbent upon the creditor, after an act of bankruptcy committed by the debtor, to receive payment of his debt. Even if it is tendered to him, he may say: "I will not accept the money tendered to me, but I will, for reasons which seem good to me, prosecute the law against you; for, in the period limited by the statute, you might have paid the debt or have disputed it, and then, upon your giving security, the proceedings might have been stayed; but you have allowed the time for doing that to go by." Here, however, the evidence on the subject of what is called the tender is very unsatisfactory. The tender was made by one clerk to another, but the clerk to whom the tender was made was not competent to deal with the subject; and on a subsequent occasion the same proposition was made. But the debtor's agent is told plainly that the debt mentioned in the petition is not the only debt which the creditor, by means of the proceedings in bankruptcy, is desirous of enforcing; and in that state the matter remains until it comes before the Registrar, when

C. J. B. 1874 *Ex parte* Boss. *In re* Whalley.

the order appealed from is made. The Registrar, being satisfied that an intention existed on the part of the debtor to pay the debt, gave him time to pay it. But what authority had he for doing so? If I were to admit the validity of Mr. *Winslow's* argument, it would be in the power of a debtor to stop proceedings and avert the bankruptcy, after committing an act of bankruptcy, upon tendering the debt. But what was the state of the proceedings before the Registrar? There was an act of bankruptcy committed, and no valid tender had been made to the creditor, but there was only a promise to pay. The Registrar could only do that which the 8th section points out. He could require proof of the existence of the debt; he could require proof of the act of bankruptcy. Both these things were proved before him. Then, after commission of an act of bankruptcy, the debtor says, "I tender the amount of the debt, and if you will give me time I will pay it;" and the Registrar, instead of pronouncing judgment, gave time for payment, and adjourned the petition. I do not think he had any authority to do this. The cases which have been cited mostly relate to a bygone state of things. *Ex parte Jay* (1) decides nothing on the present question. The distinction was there taken between a case where a receiver had been appointed and a case where that had not been done, and where, therefore, the creditor would be at perfect liberty to receive payment of his debt. That case, therefore, has no application to the one before me. The simple question before me is, whether the debt and the act of bankruptcy having been proved, and the creditor desiring to have an adjudication made, it is competent for the Judge to say, "I am so satisfied that the debtor is ready to pay, that I give him a fortnight's time to do so," that time being afterwards enlarged to a month. In my opinion there was no ground whatever for such an order, and it must be discharged. The case must go back to the County Court, and the proceedings must be continued as if no such order had been made.

Solicitors: Messrs. *Beyfus & Beyfus;* Mr. *C. B. Hallward.*

(1) Law Rep. 9 Ch. 133.

Ex parte PARKE. *In re* POTTER.

C. J. B. 1874 June 8.

Landlord and Tenant—Rent—Distress—Tenants in Common—Attornment—Chattels in Joint Possession—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 34.

Two tenants in common mortgaged an estate to secure a debt which they jointly and severally covenanted to pay, and each of them separately attorned tenant to the mortgagees of a part of the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mortgage debt. The mortgagors were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:—

Held, that the mortgagees could not distrain for the rent upon the partnership property which was on the estate.

THIS was an appeal from a decision of the Judge of the *Croydon* County Court.

By a deed of mortgage, dated the 29th of August, 1867, *Henry Potter* and *William Ferrige* conveyed certain hereditaments, to which they were entitled in undivided moieties as tenants in common, to *C. J. Parke*, *H. Hutchings*, and *Thomas St. Leger Alcock*, in fee, by way of mortgage to secure the repayment of £2000, with interest at 5 per cent., which sum was expressed to be lent by the mortgagees to the mortgagors jointly. The deed contained a joint and several covenant by the mortgagors for the payment of the £2000 with interest, and also the following attornment:—"He the said *Henry Potter* doth hereby attorn and become tenant from year to year to the said *C. J. Parke*, *H. Hutchings*, and *T. St. Leger Alcock*, their heirs and assigns, for and in respect of one equal undivided moiety of such parts of the premises hereinbefore expressed to be hereby granted as are mentioned in the schedule hereto to be in the occupation of the said *Henry Potter* and *William Ferrige*, at the yearly rent of £50, to be paid by equal half yearly payments." There was a similar attornment by *Ferrige* in respect of the other undivided moiety of the premises in the occupation of *Potter* and *Ferrige*, at a similar rent of £50.

Potter and *Ferrige* were partners in the business of brickmakers, and that part of the mortgaged premises which was in their joint occupation was used by them for the purposes of their trade. The

C. J. B. 1874 *Ex parte* PARKE. *In re* POTTER.

interest on the mortgage being in arrear, the mortgagees, on the 10th of February, 1874, issued two separate distress warrants against *Potter* and *Ferrige*. The warrant against *Potter* authorized and required the bailiff "to distrain the goods and chattels of *H. Potter* on the premises in the possession of the said *H. Potter* and *William Ferrige*, situate at *Sutton*, for £300, being six years' rent due to us by the said *H. Potter* for his one equal undivided moiety of the said premises on the 31st December, 1873, and to proceed thereon for the recovery of the said rent as the law directs." The warrant against *Ferrige* was in a similar form. Under these two warrants the bailiff seized certain bricks and machinery which were the joint property of *Potter* and *Ferrige* as partners. On the 13th of February *Potter* and *Ferrige* were adjudged bankrupts. On the 16th of February the goods seized were appraised. On the 17th of February, on the application of a receiver appointed in the bankruptcy (who afterwards became trustee), an interim injunction was granted to restrain the mortgagees from proceeding upon their distress, and this injunction was afterwards made perpetual, the Judge being of opinion that the mortgagees were only entitled to a qualified right of distress for each rent on the goods of that tenant in common out of whose moiety such rent was reserved. The proceeds of the goods, which had been sold by arrangement, were ordered to be paid to the trustee. The mortgagees appealed.

Mr. *Winslow*, Q.C., and Mr. *Oswald*, for the Appellants:—

In *Viner's* Abridgment, 'Distress' (1), it is said: "If there are several joint tenants, and one grants a rent-charge out of the land, the grantee may distrain the cattle of the grantor. But he cannot distrain the cattle of the other joint tenants. But he may distrain the cattle of a stranger that come upon the land." To the last proposition, however, is added "*Quære.*" *Bradby* on Distress (2) repeats the same proposition. If one of two joint tenants, with the assent of the other, makes a lease of the whole land, it is a good demise by both: *Viner's* Abridgment, 'Joint Tenants' (3). *À fortiori*, the two tenants in common in the present case are bound, each having granted all his own interest in the land.

(1) I. 25, 26, 27. (2) 2nd Ed. pp. 41, 76. (3) U. 4.

The presumption is that each of two partners is entitled to a moiety of the partnership property. If they are joint tenants, neither of them can say that the property seized under the distress is not his property; and we are entitled to say, "Half is seized for your debt, and the other half for your partner's debt." If they are in the position of strangers to each other, then of course we can seize their goods ⅝ on ⅛ the land. The partners, being privy to the attornments, chose to bring the partnership property on the land, and they cannot complain if it is seized under a distress for rent. Each of the parties to the deed is estopped from denying his liability to the rent reserved on the attornment of the other: *Cowper* v. *Fletcher* (1); *Morton* v. *Woods* (2). The intention here was to secure the payment of a joint debt, for which the parties made themselves jointly and severally liable. In equity they are tenants of the goods in common, just as they are of the land. *Kempe* v. *Cory* (3) does not apply, since both tenants in common are parties to the deed.

Mr. *Benjamin*, Q.C., and Mr. *E. C. Willis*, for the trustee:—

Suppose one of the tenants in common had paid his rent, and the other had not, what could the Appellants have seized under a distress then? A distress differs from a seizure under a writ of execution, in that it is of its essence that you can take the thing seized and carry it away: *In re Fanshaw* (4). It is clear from *Kempe* v. *Cory*, that where there is a lease by a joint tenant of his part, the cattle of the other joint tenant, or those of a stranger put in by his license, are not distrainable. The warrants of distress in the present case are in the proper form, and shew the exact extent of the right, namely, to seize the property of the person against whom it is issued. The only authority in favour of the Appellants is the *dictum* in *Viner* as to the cattle of a stranger, and for that there is no authority. If the Appellants are to succeed, it will be because they can seize, not the goods, but the interest of each partner in them. Two such interests will not make up a chattel.

(1) 6 B. & S. 464.
(2) Law Rep. 3 Q. B. 658; Ibid. 4 Q. B. 293.
(3) 2 Vent. 227, 283.
(4) Law Rep. 11 Eq. 615.

C. J. B. 1874 *Ex parte* PARKE. *In re* POTTER.

Mr. *Winslow*, in reply:—

If one of the tenants in common had paid his rent, still, as he was privy to the attornment by the other, he could not complain if his goods were seized under a distress. The principle of what is said by *Viner*, as to the lease of one joint tenant with the assent of the other binding both, applies to this case. There is no difference between joint tenants and tenants in common with regard to the possession and manner of taking the profits of the land: *Pullen* v. *Palmer* (1). No injustice can be done; the objection is a purely technical one; the object of the attornments was to enable the joint assets to be applied in paying the joint debt. *Pinhorn* v. *Souster* (2) shews that a stranger's goods could be seized under such an attornment.

SIR JAMES BACON, C.J.:—

A more ridiculously technical case than this can hardly be conceived at the present day, if I may use the word "ridiculous" with regard to any point of law which is merely technical; but it is a most purely technical point. If I could introduce into my decision, or if I could enter into the contemplation of, what are called equitable principles, or principles of common justice and common sense, I should have no hesitation whatever in saying that both these distresses were perfectly good distresses upon the chattels which were taken. But the law forbids me; the contract and the conduct of the parties prevent me from saying so.

Each attornment constituted the relation of landlord and tenant between one of the mortgagors and the mortgagees as to one undivided moiety of the premises comprised in the mortgage deed, and the right of distress is a consequence of the attornment. The right of distress is (to take the case of *Potter*) to distrain upon all or any of the chattels of *Potter* that can be found upon the land, and to take them, without process, without authority, other than that which the deed and the law gives to the distrainor, and to carry them away. I do not say that the power of carrying them away is conclusive of this case, but he has a right to lay hands upon the chattels. Now I should like to know how it can be said that, in exercising his right to distrain upon the goods of *Potter*, he could

(1) 3 Salk. 206. (2) 8 Ex. 763.

take away a brick in which at law *Potter* and *Ferrige* are jointly interested, and in which, in equity, *Potter* may have no interest whatever; because, if it be joint property, first of all it is subject to the payment of the joint debts, and, until the partnership obligations have been satisfied, nobody can say what is the interest of either partner in the chattels; so that, practically, not only you cannot point to any one of these chattels and say it belongs to *Potter*, but you cannot even satisfy yourself that he really has such an interest in it as would make it liable to the debt due to the landlord.

The authorities which have been referred to do not, in my opinion, in the slightest degree touch this case, except that *dictum* upon which Mr. *Winslow* very properly relied, that cattle of a stranger being upon land which is held in joint tenancy may be distrained for rent due from one of the joint tenants. I cannot follow that *dictum*. Before I could adopt it as an exposition of the law I must find it distinctly stated, and have the authority of some decided case for it. I can see reasons against it. For the stranger, the owner of the beast which the landlord wanted to distrain, would say, "You cannot say that my beast is upon *Potter's* land; shew me which is *Potter's* land. It is no more one inch or one yard of this field than another, and the onus is upon you to shew that this beast, of which you want to possess yourself in order to pay *Potter's* debt, is upon *Potter's* land, for it is only upon that condition that you can take it." That would be utterly impossible. The contract between the parties, and the law which follows upon the contract, give the landlord a right to take everything upon the entire estate which belongs to *Potter*. He may roam over the whole of the joint estate, and if he can find a horse, a sheep, or any other chattel with regard to which the title of *Potter* can be plainly made out, he has a right to take it.

It is a totally different question whether he has a right to take chattels in which *Potter*, if he has any interest, cannot have more than half at the most. It would be directly against the contract, and it would be directly against the law, to say that this creditor may come in and take another man's property to pay *Potter's* debt.

I do not in the least forget that it is in a certain sense a joint debt; there are the two rents, both of the mortgagors owe a debt,

C. J. B. 1874 *Ex parte* PARKE. *In re* POTTER.

and the property belongs to both of them in some sense or another. But I cannot resort to that consideration for the purpose of deciding the present question. I must treat these debts as if they were totally and entirely distinct and apart, and every reason which I have been considering why the mortgagees cannot distrain as regards *Potter's* debts on anything but *Potter's* separate estate or chattels applies also to *Ferrige*. You can do no more in the one case than in the other. The landlord had a right, as I have said, to lay his hands upon and to remove everything that was *Potter's*, that is to say, everything that *Potter* could remove. But *Potter* could with no justice remove these bricks. They were partnership property, and he could not take them away; if he did so he would be doing a wrong thing, for his position as partner would not give him any right so to deal with them.

The distress must be limited to chattels which belonged to *Potter* and *Ferrige* respectively, and in seizing these bricks I think the mortgagees have exceeded the right of a landlord to distrain the chattels of a tenant in common of the lands in question. He may take everything he can find belonging to the person against whom each warrant is issued. If he can find a brick that belongs to *Potter* he may take it; but if he tries to take a brick in which there is any joint ownership, he exceeds his legal right. He must not take anything that belongs to *Ferrige*, and he cannot take the joint property without taking something that does belong to *Ferrige*. I come to this conclusion reluctantly, because it is directly against the common sense and justice of the case; but as I feel satisfied it is according to law, I have no option but so to decide. I am of opinion that the order of the learned Judge of the County Court must be affirmed.

Mr. *Benjamin*:—The appeal will be dismissed with costs?

SIR JAMES BACON, C.J.:—I think it is a case in which I ought not to dismiss the appeal with costs, for the question was worthy of consideration, worthy of the learned arguments which I have heard from Mr. *Winslow* and Mr. *Benjamin*, and I think in all fairness there should not be any order as to costs.

Solicitors: Messrs. *Chauntrell & Pollock*; Mr. *W. Foster*.

GROVE *v.* COMYN.

V.-C. M.
1874
June 2.

[1874 G. 44.]

Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 3—*Sale at "Request" of Infant.*

In a suit under the *Partition Act*, 1868, for the confirmation of a conditional contract for sale of certain land to which the infant Plaintiff and the infant Defendant were entitled as co-heiresses, subject to the dower of their mother, an order was made confirming the conditional contract and directing a sale, and the decree was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant Plaintiff requested a sale.

CHRISTOPHER GROVE, who died intestate in June, 1864, left his widow, the Defendant *Marian Dorothy Grove*, since married to *Stephen Comyn*, and the Plaintiff, *Katherine Dorothy Grove*, and the Defendant *Sidney Anne Grove*, his only children, both of them infants. The intestate was seised of considerable real estate, including a freehold piece of ground containing 3R. 33P., with a house and cottage erected thereon, called *Ordnance Lodge*, at *North Hyde, Southall*, in the county of *Middlesex*. The house and cottage had been let at a rent of £54, but were now untenanted, and in consequence of the property being surrounded on three sides by a Roman Catholic pauper school and orphanage, containing about 600 pauper children, and of there being a brickfield in the immediate neighbourhood, and a large number of workmen lodged in cottages in close proximity to *Ordnance Lodge*, it had become very difficult, if not impossible, to re-let the house at the former rent; and the owners of the Roman Catholic pauper schools having offered to purchase the property for a sum of £1100, an agreement, dated the 24th of March, 1874, was entered into by the receiver of the estate to sell the said property if the sanction of the Court could be obtained.

This bill was therefore filed by *Katherine D. Grove*, one of the infant children of the intestate, by her next friend, against the widow and the other infant child, *Sidney Anne Grove*, praying that it might be declared that the said property was divisible between the Plaintiff and the infant Defendant in equal moieties, subject to the dower of the widow, and that the agreement for sale might

V.-C. M. 1874 GROVE v. COMYN.

be confirmed and carried out under the direction of the Court; or else that a partition might be made of the property amongst the persons entitled thereto.

At the hearing, the Vice-Chancellor, upon hearing affidavits in support of the statements in the bill, made a decree, declaring the rights of the parties, confirming the conditional contract, and directing a sale in accordance with the terms thereof.

In drawing up the decree the Registrar raised a difficulty that there had been no "request" made pursuant to the 3rd section of the *Partition Act*, 1868 (31 & 32 Vict. c. 40), and mentioned that in the case of *Davey* v. *Wietlisbach* (1), in which the Plaintiffs were infants, a recital was inserted in the decree that the sale was made at the request of one of the Defendants, a married woman.

Mr. *E. S. Ford*, in bringing the question to the notice of the Court, referred to the case of *France* v. *France* (2), where the "request" was made by the three infant Plaintiffs, and *Young* v. *Young* (3).

SIR R. MALINS, V.C., said it was evidently for the benefit of the parties that this estate should be sold, and he thought the difficulty might be got over by prefacing the decree with a statement that the Court was of opinion it was for the benefit of the infants, and the infant Plaintiff, by her counsel at the bar, requesting a sale.

The minutes of the decree were as follows:—

"That the piece of ground at *North Hyde*, in the bill mentioned, is divisible between the Plaintiff and the Defendant *Sidney Anne Grove* in equal moieties, subject to the dower therein of the Defendant *Marian Dorothy Comyn*, or of the Defendant *Stephen Edward Comyn* in her right; and it appearing to the Court that, by reason of the nature of the property, a sale of the said property and a distribution of the proceeds thereof will be more beneficial to the parties interested than a division thereof between or amongst them; and the infant Plaintiff, *Katherine Dorothy Grove*, requesting that the said hereditaments may be sold, and the Court being of opinion that the conditional agreement dated the 24th day of March, 1874, in the bill mentioned, is a proper agreement for carry-

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(1) Law Rep. 15 Eq. 269. (2) Law Rep. 13 Eq. 173.
(3) Law Rep. 13 Eq. 175, n.

ing such sale into effect, Doth order that the said conditional agreement of the 24th of March, 1874, entered into between the Defendant *Stephen E. Comyn* of the one part, and the Most Rev. *Henry Edward Manning*, the Very Rev. *Daniel Gilbert*, and the Rev. *James Bamber*, of the other part, for the sale of the said piece of ground situate at *North Hyde*, at the price of £1100, be carried into effect. And it is ordered that the money to arise by such sale be paid into Court to the credit of this cause, and any party is to be at liberty to apply in Chambers as they may be advised."

V.-C. M.
1874
GROVE
v.
COMYN.

Solicitors: Messrs. *Warry, Robins, & Burges.*

In re BRAIN.

V.-C. M.
1874
June 29;
July 1, 3.

[1872 B. 275.]

Petition of Right—Forest of Dean—Non-payment of Rent—Conditions—Forfeiture of Lease.

The gaveller of the *Forest of Dean* granted a gale or colliery to *J. B.*, a free miner, he paying for all coal brought out 2*d.* per ton, and so working the colliery as to gain 24,000 tons a year: Provided that if the coal gotten should not amount to that quantity, a minimum rent of £200 should be paid: Provided also, and the grant was made upon the further condition, that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years; but upon arrears of rent becoming due, the gaveller declared the gale forfeited, and entered into possession thereof. Ten months after the declaration of forfeiture the galee tendered the arrears of rent, which were refused:—

Held, upon a Petition of Right by the representatives of the galee to be reinstated in the gale, that the grant was properly made upon conditions, one of which was the payment of rent, that upon breach of that condition by non-payment, there had been a legal forfeiture and a right of the Crown to re-enter; and that the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the Court to relieve against the forfeiture.

Quære, whether the Court could have relieved if the Petition of Right had been presented within six months of the forfeiture.

THIS was a Petition of Right, presented to Her Majesty by *Ephraim Brain* and others, claiming under *John Brain*, a free miner of the *Forest of Dean*.

The petition stated that *John Brain*, having applied to the deputy gaveller of the forest for the grant of a gale or colliery known as the *Alexandra Colliery*, in the hundred of *St. Briavels*,

V.-C. M. 1874 — *In re* BRAIN.

in the county of *Gloucester*, the gale was granted to him on the 8th of August, 1864, and the certificate of the grant, after describing the boundaries of the gale, continued in these terms:—"Rendering and paying therefor to Her Majesty, her heirs and successors, for all such coal as shall be brought out, the sum of 2*d.* per ton as tonnage, such tonnage to be paid on the 24th of June and the 25th of December in every year; and, further, so working the said colliery as that there shall be wrought and gained in every year, from Midsummer, 1866, a quantity of not less than 24,000 tons: Provided that if by any reason whatsoever, in any one year, no coal shall be got in respect of the said colliery, or the tonnage rent to be paid for coal got within the year under the aforesaid reservation shall not amount to £200, then either the full sum of £200, or such other sums as, together with the amount paid or to be paid for tonnage rent in respect of coal got within the year (as the case may be), will make up the full sum of £200, shall be made up and paid to Her Majesty, her heirs and successors, on the 24th day of June in every year: Provided also, and this grant is made upon this further condition, that the veins of coal hereby granted or galed shall be so worked as not to impede or injure the workings of the tracts already allotted or galed."

In August, 1864, one moiety of the *Alexandra Colliery* was granted by *J. Brain* to the suppliant, *Ephraim Brain*, his heirs and assigns for ever, and another moiety was granted by *J. Brain* to the suppliant, *Richard Cook*, his heirs and assigns for ever. *Ephraim Brain* and *R. Cook* afterwards made a grant of their respective moieties of the collieries to other persons, who were also suppliants upon this Petition of Right.

J. Brain had since died.

On the 24th of June, 1867, the first year's rent of the colliery became due, and the sum of £200 was then paid by the suppliants. The next two years' rent becoming due on the 24th of June, 1868, and the 24th of June, 1869, were also paid; but as the colliery had not then been worked, a correspondence took place upon the subject between the deputy gaveller and the suppliants, which resulted in the deputy gaveller extending the period for working the colliery for five years longer. The rent after this period, however, was not paid, and in the months of April, May, and

June, 1871, applications were made by the deputy gaveller to the suppliants for payment of the rent which had become due in respect of the colliery, and further correspondence passed between them. Ultimately, on the 17th of July, 1871, the following declaration was addressed to the suppliants:—"Whereas there was due to Her Majesty the Queen, at Midsummer, 1870, for rent in respect of the *Alexandra* gale, the sum of £200, which still remains due and unpaid. Now, I, the Honourable *James Kenneth Howard*, the Commissioner of Her Majesty's Woods, Forests, and Land Revenue, having the management and direction of Her Majesty's *Forest of Dean*, and gaveller of the forest, do hereby give you, and every of you, notice that the said gale has become, and I do hereby declare the same to be, forfeited to Her Majesty." This declaration was sent to the suppliants on the 24th of July, 1871, by Mr. *Horace Watson*, the solicitor to the Honourable Mr. *Howard*, accompanied by the following letter:—"Sir,—I send you herewith a notice declaring the forfeiture of the gale of the *Alexandra Colliery*, under which possession has been taken by the deputy gaveller." Immediately after the date of this notice, possession of the *Alexandra Colliery* was taken by the deputy gaveller, who still retained possession thereof under the alleged forfeiture.

In the meantime, and on the 22nd of July, 1871, an application was put in at the office of the gaveller at *Coleford*, by *Benjamin Gwilliam*, a free miner of the forest, to have a re-gale granted to him of the *Alexandra Colliery*. On the 24th of May, 1872, a notice was inserted in the *Forester*, a newspaper circulating in the neighbourhood, that the *Alexandra* gale so applied for by *B. Gwilliam* was intended to be granted to him on the 14th of June.

On the 13th of June, the day before the gale would have been granted to *Gwilliam*, the suppliants tendered to the gaveller the sum of £500, being the amount of the rent then due in respect of the said colliery up to the 25th of December, 1871, but the gaveller refused to accept the same, and insisted that the suppliants had forfeited all right to the colliery.

On the 14th of June the suppliants appeared by their solicitor at the gaveller's office, and protested against the proposed grant of the gale to *B. Gwilliam*, on the ground that the alleged forfeiture

V.-C. M. 1874 *In re* BRAIN.

was void in law, and that even if it were not, the tender of the rent in arrear was sufficient to relieve the suppliants against such forfeiture, and thereupon the gaveller postponed all further proceedings till the 26th of July instant. The suppliants therefore submitted that the declaration of forfeiture was illegal and void, inasmuch as no power to re-enter, or right of eviction for non-payment of rent, was given by or existed under the Acts of Parliament, but other and sufficient remedies for enforcing payment of the rents and royalties, and other dues payable in respect thereof, were provided by the Acts; but that even if they had legally incurred a forfeiture of the gale by reason of non-payment of rent, yet in equity and justice they ought to be relieved therefrom upon payment of all arrears of rent due, with all interest thereon, which they were willing to make.

The petition then alleged that the gaveller still intended to enforce the grant of the gale to *Gwilliam*, and it prayed a declaration that the forfeiture of the 17th of July, 1871, was illegal and of no effect; or if it should appear to the Court that the forfeiture was valid, then, upon payment of all arrears of rent due in respect thereof, with interest thereon, the suppliants might be relieved from the effect of such forfeiture, and might be restored to the possession of the gale; and that in the meantime the gaveller might be restrained by injunction from granting the gale to *Gwilliam* or any other person without the consent of the suppliants.

The Acts of Parliament referred to in the petition and in the arguments of counsel as bearing upon the questions now raised for decision, were the following: the statute 1 & 2 Vict. c. 43. By sections 13, 14, 16, 23, and 44 of that Act, the office of gaveller of the *Forest of Dean* and hundred of *St. Briavels*, in the county of *Gloucester*, was vested in the First Commissioner for the time being of Her Majesty's Woods and Forests, who was authorized to perform all acts necessary for granting gales in the forest to the free miners; and it was provided that such free miners should have the exclusive right of having gales granted to them, and it should be lawful for them to sell, transfer, assign, or dispose of the gales by deed or will to each other, or to any other person or persons whomsoever, and that the galeage, rent, royalty, tonnage,

duty, or other payments to be ascertained and determined by Her Majesty's Commissioners for or in respect of the coal or iron ore, to be got by means of the said gales or works then existing, and which should be set forth in their award, should be deemed and taken in lieu of the rights of Her Majesty to put in a fifth man to work the gales and share the profit thereof.

The 29th section enacted "that the Commissioners hereby appointed shall in and by their said award specify such general rules and regulations as to them shall seem equitable for the mode in which all the said gales, pits, levels, works, and quarries, as well opened or to be opened, shall be worked, and shall also specify what buildings may remain or be erected on any of the open and uninclosed lands of the said hundred, for the purposes of working such gale, pit, level, or work, and shall also, as far as the same can be ascertained, specify the mode and extent to which all future gales, pits, levels, or works shall be granted by the gaveller or deputy-gaveller for the time being, having regard to the quantity of coal, iron, or other mineral comprised in, and which may be got by means of such gales, pits, levels, or works respectively, and the terms and regulations under which the same shall be held and worked; and that after such award all and every the gales, pits, levels, and works in the said hundred, and all the quarries in the said forest shall be opened and worked according to the true intent of such rules and regulations; and that in case any person or persons entitled to or in the possession of any gale, pit, level, work, or quarry within the said hundred now granted, or hereafter to be granted, awarded, or leased, shall wilfully proceed in opening or working any such gale, pit, level, work, or quarry, contrary to the said rules and regulations, and the directions to be contained in any award of the said Commissioners hereby appointed, after seven days' notice in writing, from the gaveller or deputy-gaveller, to stop and discontinue such opening and working, left at or upon the said gale, pit, level, work, or quarry, or at the last known or usual place of abode of such person or persons as aforesaid, then the said gales, pits, levels, works, or quarries shall be liable to be forfeited as and for a breach of condition; and the same shall always, after the said award, be considered as held on condition of performing and abiding by the said rules and regu-

V.-C. M. 1874 *In re* BRAIN.

lations in all respects: and the person or persons in possession of any such gales, pits, levels, works, or quarries, may be evicted therefrom by Her Majesty, her heirs or successors, as might be done on the forfeiture of a lease for breach of condition, and all such gales, pits, levels, works, or quarries so forfeited shall be subject to be again galed or leased."

And the 52nd sect. enacted "that all and every the powers of taking, suing for, or recovering of the said share, rents, and payments now in force by virtue of any statute, custom, grant, or otherwise, shall continue to be in force, and the said powers, so far as the same may be applicable, shall apply to any galeage, rent, royalty, tonnage, duty, or payments hereafter to be ascertained, fixed, and determined, either by the said award as aforesaid, or by any other means howsoever."

The statute of 1861, 24 & 25 Vict. c. 40, provided by the 1st section: "That the grant of a gale of coal or iron, or of a stone quarry, shall be deemed to have conferred, and shall confer on the galee, his heirs and assigns, a license to work the mine, vein, or pit therein comprised, and such grant shall be deemed to have conferred on the grantee, his heirs and assigns, an interest of the nature of real estate, such license, nevertheless, being conditional on the payment of all the rents, royalties, and other dues, from time to time payable to Her Majesty, her heirs and successors, in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use, and management of the gale."

The 3rd section enacted that nothing in this Act contained should enlarge or diminish, or in any way affect, any right of re-entry or eviction, or liability to forfeiture, but every gale, pit, level, work, and quarry should be subject in all respects to the same liability to forfeiture and eviction, and no other, as if this Act had not been passed.

And by the 4th section the obligation to pay the rent, royalty, and other dues, from time to time becoming payable in respect of every gale of coal, iron, or stone granted, or to be granted, and to observe and perform the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use,

and management of the same, was made a personal obligation on the person for the time being in the actual possession or receipt of the proceeds of the gale, whether as owner thereof for an estate of freehold, or as lessee, or as under-lessee, or otherwise howsoever, and every such person making default in the payment of any such rent, royalty, or due, or in the observance or performance of any such enactment, provision, rule, or regulation as aforesaid, might be proceeded against by or on behalf of Her Majesty, her heirs and successors, in like manner as if he had entered into a covenant with Her Majesty, her heirs and successors, to pay such rent, royalty, or other due, and to observe and perform all such enactments, provisions, rules, and regulations: Provided, also, that the provisions in the section should be by way of addition to, and not substitution for, any covenants, conditions, or stipulations in any grant, and should not extend to diminish or alter any liabilities otherwise existing.

The statute of 34 & 35 Vict. c. 85, which was passed for the purpose of settling doubts that had arisen upon the construction of some of the rules and regulations made under the authority of the Act 24 & 25 Vict. c. 40, and for altering and amending the previous enactments, provided by the 36th section that the provisions of an Act, 59 Geo. 3, c. 86, for the better collection and recovery of the gale rents in the *Forest of Dean*, should extend and apply to the recovery of all sums due to Her Majesty, her heirs and successors, in respect of galeage, or dead or certain rent, royalty, or tonnage duty, due in respect of any gale within the limits of that Act.

Mr. *Cotton*, Q.C., and Mr. *Bevir*, in support of the Petition of Right:—

The grounds upon which the Crown claims a right to forfeit the gale originally granted in August, 1864, to *J. Brain* are, first, non-payment of rent; and, secondly, an omission on the part of *J. Brain* or his transferees to work the mine. The latter point, however, is quite untenable, since permission in writing was given by the Crown in 1869 extending the period for working to five years, and there were three years of that period to run when the forfeiture took place. It is now understood that that point is

V.-C. M. 1874 *In re* BRAIN.

waived by the Crown, and the only question, therefore, remains, whether the Crown had a right of re-entry and forfeiture upon non-payment of rent. Upon this question will also depend the right of *Gwilliam* as against the suppliants.

The statute of 1 & 2 Vict. c. 43, is the Act giving the gaveller such rights as he may exercise against the free miners of the *Forest of Dean*. The rights of free miners had previously existed for centuries, but it was found necessary to settle certain disputed questions, and it was thought desirable that the right of the Crown to put in a fifth man in certain cases should be done away with, and the new rights conferred upon the Crown were given in lieu of the right to put in the fifth man. The Crown, therefore, cannot now claim any powers which were not conferred by that Act.

All these questions were set at rest by the Act of 1 & 2 Vict. c. 43, but it will be seen that there is no power of re-entry or forfeiture upon non-payment of rent, although there is power of forfeiture for working the same in an improper manner. It is clear, moreover, that no such power could ever have been intended to be given, since the Act contains full means by which the Crown may recover the rent which becomes due. The 52nd section of the statute is explicit upon that point, which enacts that all powers of taking, suing for, or recovery of the share, rents, and payments then in force by virtue of any statute, custom, grant, or otherwise should continue to be in force, and the said powers, so far as the same might be applicable, should apply to any galeage, rent, royalty, tonnage, duty, or payments thereafter to be ascertained, fixed, and determined. Up to that time no power of re-entry was ever given by any previous Act. The 29th section gives power of forfeiture for improper working, and the fact that no such power is given for non-payment of rent is evidence that it could not have been intended to confer any such new power on the Crown. But suppose the Crown had power to forfeit the lease for non-payment of rent, still this Court will always relieve against the execution of such a power upon the arrears of rent being paid. In this case the arrears of rent with interest were tendered to the Crown, and there was no justification in putting in force any powers which might have existed. It was further incumbent

upon the Crown, under the Act of 4 Geo. 2, c. 28, to bring an action of ejectment, and the suppliants would then have had six months within which they might have come to this Court to stop the action. The suppliants have already paid three years' dead rent in respect of this gale, and they consider that they have been very harshly dealt with by the Crown in being deprived of the benefits which they would have in working the colliery. The right of *Gwilliam*, who was an applicant for the gale alleged by the Crown to have become vacant, must stand or fall by the right of the suppliants. If the gale was not legally forfeited, then *Gwilliam* can have no right.

The *Attorney-General* (Sir *R. Baggallay*), Mr. *Glasse*, Q.C., and Mr. *W. W. Karslake*, for the Crown:—

The questions are whether, on the 24th of July, 1871, the gaveller was entitled to resume possession of the gale granted to *J. Brain*, and if so entitled, whether there is any present right on the part of the suppliants to be replaced in their occupation of such gale. To remove any impression of harsh treatment on the part of the Crown, it is necessary to refer to the facts, shewing that notwithstanding the non-working of this mine for the space of five years, the Crown still extended the period of working for five years. But after that there was no commencement of the works, and when three half years' rent had become due it was incumbent on the Crown to take steps for recovering it. Bringing an action against men of this class would have been useless, and there was nothing to distrain upon which could have satisfied the rent. Therefore, after repeated applications for payment, the gaveller found it necessary to declare the gale forfeited. Even after this period no steps were taken by the Crown towards regaleing the mine for ten months, during which time the suppliants made no attempt to get replaced, and made no offer of payment. It was only at the last moment—the very day before notice had been given that the gale would be granted to *Gwilliam*—that the suppliants came forward with a tender of the arrears of rent. The gaveller then considered that he was not justified in accepting the tender, in justice to the other applicants, and, moreover, the Crown was desirous of having the question settled

V.-C. M. 1874 *In re* BRAIN.

whether or not it had any power of forfeiture and re-entry for non-payment of rent.

In the case of *James* v. *The Queen* (1), it was decided by this Court that a free miner had established his right to a gale the moment he made his application; consequently if the forfeiture in this case was legal, *Gwilliam*, who made the first application, might maintain a suit for specific performance, and thus it becomes imperative on the Crown to have the question decided.

The substantial question is, whether there was a right in law on the part of the Crown to resume possession for non-payment of rent.

The grants of gales in the forest are nothing more than licenses to work a mine upon certain conditions, which in this case were, that the galee should work and raise at least 24,000 tons of coal per annum, and pay 2*d.* per ton upon all coal so raised, and upon failure to raise that quantity, then upon condition of paying a minimum or dead rent of £200. The right of the gaveller to fix a minimum rent in case of failure to raise the specified quantity of coal was settled by the decision of the Queen's Bench on the 1st of May, 1851, in the case of *Lord Seymour* v. *Morrell* (2). The license, therefore, is upon condition of paying a certain rent, and so long as the condition is performed the Crown would have no right of re-entry; but upon breach of the condition the Crown has a right to forfeit the license, and resume its prerogative rights over the property. It is well stated in *Chitty's* Prerogatives of the Crown (3): "The general rule is, that the king may waive his prerogative remedies and adopt such as are assigned to his subjects. He may maintain the usual common law actions, as trespass, *quare clausum fregit*, or for taking his goods. The only exception seems to be in the case of actions, which suppose an eviction or disseisin, as an assize, or, it seems, an action of ejectment. The king cannot maintain such actions, they being inconsistent with his royal dignity, and contradictory to the fiction of law, that the king cannot be dispossessed of property once vested in him." And by *The Queen's Remembrancer Act* (22 & 23 Vict. c. 21, s. 25) it is enacted that when a right of re-entry upon lands or other hereditaments shall have

(1) Law Rep. 17 Eq. 502. (2) Not reported.
(3) Page 245.

accrued to Her Majesty or her successors, such right may be exercised or enforced without any requisition being taken or office being found, or any actual re-entry being made on the premises.

The gaveller, therefore, was justified in making a re-entry upon the gale without bringing an action of ejectment.

Then we say that this license was granted upon conditions, one of which was payment of rent, and this is clear from the 29th section of the Act 1 & 2 Vict. c. 43, which provides that all mines should be worked according to the true intent of the rules and regulations laid down by the Commissioners, one of which rules was, that a certain rent should be paid, and if a galee shall act contrary to the regulations, then the gale is liable to be forfeited as and for a breach of condition, and the same shall be considered as held on condition of performing and abiding by the rules and regulations in all respects, and the person in possession may be evicted, as might be done on the forfeiture of a lease for breach of condition. That this is an estate held upon condition, is shewn by a passage in *Co. Litt.* (1), where it is said, "Also divers words there be which by virtue of themselves make estates upon condition, one is the word *sub conditione*, as if *A.* infeoff *B.* of certain land, to have and to hold to the said *B.* and his heirs, upon condition that the said *B.* and his heirs do pay or cause to be paid to the aforesaid *A.* and his heirs yearly such a rent, &c. In this case, without any more saying, the feoffee hath an estate upon condition;" and (2), "Also there be other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c., and afterward this word is put into the deed; that if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c., this is a deed upon condition."

So in *Sheppard's* Touchstone (3) it is laid down thus: "If a lease be made on condition that the lessee shall pay yearly to the lessor during the term £10, in this case if he fail of payment once, the condition is broken, and the estate forfeit; so if one make a feoffment in fee of land on condition to pay £10 yearly to *J. S.*, if he fail once the condition is broken."

(1) Sect. 328. 19th Ed. (2) Sect. 330. 19th Ed.

(3) Vol. i. p. 147.

V.-C. M. 1874 *In re* BRAIN.

There is a distinction between contracts between parties and conditions under an Act of Parliament. It was argued in *Keating* v. *Sparrow* (1) that this Court would lean against forfeiting a lease if the landlord could be compensated; but the Lord Chancellor (Lord *Manners*) held that, although that principle was applicable to cases of contract between the parties, it was not so to the provisions of an Act of Parliament or conditions in law. In support of that decision His Lordship cited *Peachy* v. *Duke of Somerset* (2). If, therefore, no relief can be granted against the provisions of this statute, and if forfeiture arises under the 29th section, there is statutory compulsion on the gaveller to re-grant the gale.

Mr. *Renshaw*, jun., for *B. Gwilliam.*

Mr. *Cotton*, in reply:—

It is impossible to construe the 29th section of the Act (1 & 2 Vict. c. 43) as giving any right of re-entry or forfeiture on non-payment of rent. It was only a right upon not working up to the quantity of tons specified in the grant, and that right was waived by the Crown when a permission was granted in 1869 to work within the following five years. The only condition was that the mine should be so worked, or else that a dead rent should be paid, and for the recovery of that rent ample means are provided. It is said that this is not a lease, but only a license so long as certain things are done, if so it would be revocable; but that is not the case, and as regards the right of re-entry it stands in the same way as any other lease. If it were a license, it would be revocable at the will of the lessor. A power of re-entry for non-payment of rent would be inconsistent with the other provisions of the Acts. By the 4th section of the 24 & 25 Vict. c. 40, the obligation to pay the rent is made a personal obligation on the lessee in possession, and every person making default in payment is liable to be proceeded against as if he had entered into a covenant to pay, and there is power to the gaveller to refuse a transfer of the gale if the rent is in arrear and unpaid. If the obligation to pay rent is on the same footing as under a covenant, then an action may be brought upon the covenant, and the gaveller would have a distress upon the goods of the galee.

(1) 1 Ball. & B. 367. (2) 1 Str. 447.

Then it is said that this is a lease upon conditions, and *Coke* upon *Littleton* is referred to; but in another section we find this (1): "But where a feoffment is made of certain lands, reserving a certain rent, &c., upon such condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter and to hold the land until he be satisfied or paid the rent behind, &c., in this case if the rent be behind, and the feoffor or his heirs do enter, the feoffee is not altogether excluded from this; but the feoffor shall have and hold the land and thereof take the profits until he be satisfied of the rent behind; and when he is satisfied then may the feoffee re-enter into the same land and hold it as he held it before. For in this case the feoffor shall have the land, but in manner as for a distress until he be satisfied of the rent, &c., though he take the profits in the meantime to his own use."

We say, also, that the gaveller being now satisfied by the arrears of rent tendered to him, the galee has a right to re-enter and hold as he held before.

Under any circumstances this Court can relieve the suppliants against the forfeiture, now that the rent is forthcoming. This doctrine was settled by the Act of 4 Geo. 2, c. 28, and was upheld in the case of *Hill* v. *Barclay* (2); and it would not be just that the suppliants should be prevented from re-entry after already having paid no less than £600 by way of dead rent.

SIR R. MALINS, V.C.:—

This Petition raises a point of considerable interest with regard to the rights of free miners in the *Forest of Dean*, which certainly are very important rights, as regards the position both of the Crown in respect of its property in that district, and of the free miners of the forest. These peculiar rights are accurately described in the report of a decision which I gave on the 11th of February last in the case of *James* v. *The Queen* (3).

The transactions out of which the question arises are not in dispute. It appears that, on the 8th of August, 1864, a gale or right to work a colliery called the *Alexandra Colliery* was granted to *J. Brain*, a free miner, by the gaveller of the forest, who is the

(1) Sect. 327. 19th Ed. (2) 18 Ves. 56.
(3) Law Rep. 17 Eq. 502.

V.-C. M. 1874 *In re* BRAIN.

proper officer of the Crown for the purpose. That was granted to him in the following terms:—[The grant is set out in the statement of the Petition.]

It appears that *J. Brain* had not himself the capital to work the gale, which it was stated would require as much as £30,000, as it extends over an area of about 900 acres, and probably is of great value. Then *J. Brain*, having no capital, conferred a grant of one moiety thereof upon the suppliant, *Ephraim Brain*, and another moiety upon other persons, who are now represented by the other suppliants; and after these grants *J. Brain* died. Up to the end of the first five years, that is 1869, the minimum rent of £200 per annum was paid to the Crown; but the colliery was never worked, and the Crown thereupon extended the period within which the gale should be worked for five years longer—that is, up to the present year. After 1869 the rent fell in arrear, and in the early part of 1871 a correspondence took place between the gaveller and the suppliants, when applications were made for payment of the arrears of rent. This correspondence ended by the gaveller making a declaration, on the 17th of July, 1871, that in consequence of non-payment of the rent for the previous year the gale had become forfeited, and possession thereof had been taken on behalf of the Crown. Immediately after the suppliants had been served with notice of this forfeiture, possession was in fact taken by the deputy gaveller; and, on the 22nd of July an application for a grant of this gale was made to the gaveller by *Benjamin Gwilliam*, also a free miner. The effect of this application for a gale, as I decided in *James* v. *The Queen*, is to give the free miner first applying a priority. I am assuming now that this was a perfectly vacant possession, and that all the rights of *Brain* were gone the day after the Crown resumed possession. It would seem, therefore, that *Gwilliam*, in making this application would stand the first, and that others making subsequent applications would stand behind him; and if *Brain* was out of the way, and *Gwilliam* was out of the way, the next person standing behind him would be entitled, and so on.

Now the Crown seems, after the 21st of July, to have done nothing for some months, and I think it is perfectly clear that the suppliants did nothing, for there is no evidence of any letter of complaint having been written, or any offer made by the suppliants

V.-C. M.
1874
In re
BRAIN.

to pay the rent due. Accordingly the Crown, having been in possession since July, and there being other applications made for the gale, was warranted in assuming that there was an end of *Brain* and those associated with him, for they allowed from July, 1871, to May, 1872, to elapse without taking any step the whole time. I am satisfied that if the suppliants had tendered the rent during the interim, the Crown would have been willing to accept it and to restore the suppliants to their previous position.

Under these circumstances the next step taken by the gaveller was to issue a notice on the 24th of May, 1872, in the newspaper called *The Forester*, according to the usual course adopted in such cases, that an application for a grant of the *Victoria Gale* had been made by *Benjamin Gwilliam*, and that it was intended to grant the gale to him on the 14th of June, 1872, at the gaveller's office. This notice seems to have startled the suppliants into activity, and then, finding their rights would be finally gone unless something was done, they found means to procure the rent, and offered the whole rent in arrear, together with interest, to the gaveller. That offer was refused, and the gaveller—very properly, I think—desiring to ascertain what rights the parties had, and whether the Crown had a right to resume possession or not on non-payment of rent, suspended the grant to *Gwilliam;* in consequence of which this Petition of Right was presented on the 14th of July, 1872, and the question having gone before the Law Officers of the Crown, the usual fiat that right should be done was made, and on the 4th of September the matter was set down for hearing, and now comes on for decision.

Now, there are two questions here to be decided: First, has the Crown a right to resume possession for non-payment of rent. If the Crown has not that right, then the second question does not arise; but if the Crown has a right of re-entry for non-payment of rent, then is this a case in which the Crown ought to give relief against the forfeiture, the rent having been tendered in June, 1872.

The first and most material question is, whether the Crown has a right to re-enter for non-payment of rent. That question involves considerations of great importance; considerations of the principles upon which grants are made, and we must look in some degree to

V.-C. M. 1874 *In re* BRAIN.

what the real principles of law are upon the subject. In days of simplicity, before law became so complicated a science as it is now, the common form of making a feoffment or grant was upon conditions. A man made a feoffment upon condition that a certain sum of money should be paid upon a certain day, which was a condition at common law, and if that condition was not fulfilled he had a right of re-entry. So if he had made a lease upon condition of payment of rent, it is perfectly clear that upon non-payment of the rent he had a right of re-entry. But that was found a very inconvenient course, and therefore the necessities of modern society remodelled this rule, and the form went entirely out of use, and we know now that the usual form of granting a lease is that *A.*, the lessor, grants to *B.*, the lessee, upon rendering and paying a certain amount of rent; and there are also certain covenants for paying the rent and doing repairs, and whatever the parties may agree upon. Then a lease always (there is scarcely ever an instance to the contrary) concludes with a proviso for re-entry for non-payment of rent after a certain time, as for a breach of covenant contained in the lease, so that every lessor does secure to himself a right of re-entry in case his rent is not paid.

Then the Court of Chancery, which takes a benignant view of the rights of parties, and does justice as far as it can between them, had got into the habit of granting indefinitely a right of relief against these forfeitures. The Court said this being a forfeiture for non-payment of rent, if relief is granted, when the rent is paid justice will be done between the parties, therefore relief was given in those cases of forfeiture for non-payment of rent, and that practice having been carried to an undue extent, the well-known statute of the 4 Geo. 2, c. 28, regulating the law of landlord and tenant was passed, not only giving the landlord a right of recovering upon ejectment, but giving to the tenant the same valuable right of stopping the proceedings by tendering his rent within a stated time; if the tenant tenders the rent, the action of ejectment is stayed. Further, it gives the tenant a right of filing a bill in Chancery within six months after the non-payment of rent.

Now, if this is a case of conditional lease, it is perfectly clear that the Crown had a right of re-entry; if it is not a condition, is it not right that every owner of property granting a lease in considera-

tion of the payment of rent should have the right of re-entry if the lessees cannot or will not pay the rent? Natural justice requires this. Here the property belongs to the Crown, subject to the rights of the free miners; now the free miners have very absolute rights. I have decided that question already, my decision is acquiesced in, and I believe there is no doubt about the correctness of it. I have decided that the right of the free miners is an absolute right; any omission of the gaveller to enter an application, or any omission of that kind, would not deprive the free miner of his rights; but the *Forest of Dean* is the property of the Crown, and the Crown, making this grant, does so upon certain conditions as to rent.

I believe the principle is clear that every lessor ought to have, and I believe there is no instance in which he has not, the right of recovering possession of land if his rent be not paid; because if it is a grant upon conditions at common law, undoubtedly he can resume possession upon a failure to perform the conditions; if it is not a grant upon conditions he undoubtedly reserves the right to himself. The Crown here reserves no such right in terms, but it is perfectly clear to my mind that these grants are had upon conditions, that is to say, conditions affixed inherently to the grant, that if the tenant does not pay the rent the Crown has a right to resume possession. I am satisfied, upon the terms of the grant, that it is a conditional grant. What is it in its terms? "Granted a gale to *John Brain*, of the *Alexandra Colliery*, rendering and paying therefor to Her Majesty, her heirs and successors, for all such coal as shall be brought out so much money, and further so working the said colliery"—that is to say, working the coal and paying the rent—"he must do so upon this further condition." There cannot be a further condition unless there has been one already; to make that a further condition there must have been one before. What is the further condition? It is as plain to my mind as if it had been in these words: Granting to him upon condition that he shall render 2*d.* for every ton of coal, and pay the rent every half-year; and upon the further condition that he shall do certain things. What do we want beyond that? Here is a grant from the Crown upon condition. The tenant is bound to perform that condition; it is not an unreasonable one, it is one he ought to perform, and it is one which upon

V.-C. M. 1874 *In re* BRAIN.

every principle, if he fails to perform it, ought to entail the loss of possession. What can be more monstrous than the argument that the grantor is to submit to the non-payment of rent year after year with no right to re-enter—to say, in fact, that it is not a condition, and therefore there is no right of re-entry in the Crown: the Crown having reserved no right of re-entry, and the Act of Parliament having given none, therefore the Crown must hold this property year after year without any possibility of recovering the rent.

It has been said that it might be recovered by an action, but let us look at that. These free miners are men working at moderate weekly wages; to sue them at law would be useless, to distrain upon the property would be impossible, there is nothing to distrain, it is an unopened mine, they have not got beyond the surface.

Now, under these circumstances, ought not the Crown to have this right? I am clearly of opinion that they ought to have it, and I am equally clearly of opinion that they have it; because I am satisfied upon the very terms of the grant that it is a grant upon condition, and therefore is like a grant at common law, to which I have already referred, in which case, if the condition is not performed, the grantor enters into possession. Therefore, even independently of the statutory regulations, this is the conclusion to which I should come upon the grant itself; and, looking at the statute, I have no doubt that that is the intention of the Legislature. It has been strongly argued that this 29th section (1 & 2 Vict. c. 43) imposed no conditions with regard to the payment of rent, but that it did impose conditions with regard to the mode of working. Now, what are the probabilities of such a construction? A man is bound to work in a particular manner, and it is conceded that if he does not work in a particular manner the Crown has a right to re-enter. What can be more absurd than to suppose that with regard to such an essential condition as the payment of rent, the Crown has no right of re-entry? Or to say that although a man may commit a slight breach of his contract under which the Crown might re-enter, yet that non-payment of his rent should confer no right of re-entry? I cannot construe the Act in any other way than as intending to give the Crown a right to enter if there is a breach of any part of the contract.

V.-C. M. 1874 *In re* BRAIN.

The 29th section enacts that the Commissioners shall specify such general rules and regulations as to them shall seem equitable for the mode in which the gales shall be worked, and shall specify the terms and regulations under which the same shall be held and worked; and in case any person so entitled to, or in the possession of, a gale now granted, or hereafter to be granted, shall do certain things contrary to the rules and regulations, or shall not discontinue after notice served upon them, then the said gale shall be liable to be forfeited as and for a breach of condition, and the same shall always be considered as held on condition of performing and abiding by the said rules and regulations in all respects.

Now, is not the rule and regulation to pay the rent a rule and regulation the most important and the most essential of all? But it is said he may totally disregard the rule as to payment of rent, which is to be by half-yearly payments, at Midsummer and at Christmas, that that is not a rule and regulation, and that he may totally disregard it; that while he was liable to be evicted for any slight breach of the covenant, for the most important of all he is not liable to be evicted. What does the clause say? "On condition of performing and abiding by the said rules and regulations in all respects; and the person or persons in possession of any such gales, pits, levels, works, or quarries, may be evicted therefrom by Her Majesty, her heirs or successors, as might be done on the forfeiture of a lease for breach of condition; and all such gales, pits, levels, works, or quarries so forfeited shall be subject to be again galed or leased," and so forth. That is, in my opinion, a distinct enactment, that if there is a breach of any of the rules upon which the grant is made, and the payment of the rent is one of those rules, there is certainly a right of re-entry; but I think that all possibility of doubt upon that subject is removed by the 13th rule, which was made in the year 1841, many years before the grant to *John Brain* was made; and this is by a subsequent Act of Parliament declared to be law. It prescribes "That as to all gales hereafter to be granted"—that refers to *John Brain's* gale—"the same shall only be granted upon condition that the galee work and get in each and every year a certain quantity of coals, so that the rent, tonnage, duty, or royalty payable and to be paid to Her Majesty, her heirs and successors, shall

V.-C. M. 1874 *In re* BRAIN.

not be less in any year" than a certain sum. The document of the 8th of August, 1864, is in exact conformity with those rules, "shall not be less in any year in respect of coals got than a certain sum to be expressed in and by the grant of every future gale; and such minimum quantity of coals shall be ascertained and determined by the gaveller or deputy-gaveller" (which it was by the document I have just referred to), "or by arbitration, as is provided or referred to in the 56th section of the printed copy of the said Act, and further upon condition that the galee do, in the event of there not being sufficient coal to make up the certain sum by way of rent to be so expressed, pay and make up such certain sum annually." So that the gaveller is actually required to grant it upon condition, and he has, in my opinion, faithfully performed that duty by the grant of the 8th of August, 1864, which is upon condition that these rents be paid.

Then comes the statute of 1861, which is said to affect the question. That statute, again, enacts that the grant of a gale shall be deemed to have conferred and shall confer on the galee a license to work the mine, such license, nevertheless, being conditional on the payment of all the rents, royalties, and other dues payable in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use, and management of the gale. Now, if it had stopped at that—if there had been nothing further, it is perfectly clear that that would have made it a conditional grant; but Mr. *Cotton* says that makes it of no operation, because the 3rd section says: "Provided always, that nothing in this Act contained shall enlarge or diminish or in any way affect any right of re-entry or eviction, or liability to forfeiture; but every gale, pit, level, work, or quarry shall be subject in all respects to the same liability to forfeiture and eviction, and no other, as if this Act had not been passed." My opinion is that that does not alter the operation of the former part of the section.

For the reasons I have stated, I am clearly of opinion that, by the form of the grant under the 13th rule, it was clearly necessary that it should be conditional, and it was made conditional: and therefore it is not necessary to resort to this section, because that

only provides as for the future what had been done before, that grants must be conditional upon the terms being fulfilled.

Therefore, upon these grounds, I am of opinion that the Crown, on the 17th of July, 1871, upon the non-payment of the rent due up to that time, was entitled to re-enter as for a breach of the condition upon which the grant was made; and consequently that what they did was right. Now, Mr. *Cotton* argued that upon many of these rights there must be an action of ejectment brought. Although I am clearly of opinion that the proper course for a landlord who has a right of action for re-entry to pursue is to bring an action for ejectment, which is prescribed by 4 Geo. 2, c. 28, yet it would be quite sufficient if the tenant, being in default, and having notice that he is in default, and that the landlord has the power of re-entry, chooses to acquiesce in the re-entry, not desiring to put his landlord to any unnecessary trouble. The landlord says, I intend to re-enter upon a particular day, and the tenant not having the means of paying his arrears of rent, makes no opposition, he is therefore, in my opinion, in the same position as if the landlord had recovered under an action of ejectment—it would have been vain to have put him to that trouble. And this is a case in which the tenants, knowing that the landlord intended to re-enter upon a particular day, acquiesced in it for a period of at least ten months afterwards; therefore I must take it that the Crown did this act with the acquiescence of the tenants, and resumed possession upon the 24th of July, 1871.

What was the state of things at that time? The conditions of the grant were broken, and the Crown is in possession as though the grant to *John Brain* had never been made. Now, it is not necessary for me to say whether, during six months, there would have been a right as against the Crown to redeem upon payment of rent—that is to say, as an ordinary tenant can, by payment of rent and interest within six months, claim relief in this Court. It is clear, by what Lord *Eldon* said in the case of *Hill* v. *Barclay* (1), that an indefinite period is no longer applicable. The tenant, to recover possession, must file his bill or take his proceedings within six months. It is not necessary for me to say, therefore, what would have been the position of these suppliants if, within six

(1) 18 Ves. 56.

V.-C. M. 1874 *In re* BRAIN.

months, they had made an application to the Court. It is enough to say that the right of re-entry having been exercised in July, 1871, this Petition was not filed until June, 1872: therefore, that lapse of time is a fatal bar to any such claim, unless the Crown chose to acquiesce in it, and I have no right to say they are bound to do so. I am far from saying that, and I am far from holding out any encouragement to those free miners to rely upon any such possibility. They must make up their minds, when they take a gale, whether they can work it and pay the rent for it. I do not desire to hold out any hope that this Court will relieve them against those forfeitures if they do not pay their rent. I am very much inclined to decide the question upon the ground referred to in *Keating* v. *Sparrow* (1), that these would be statutable rights, and that, if properly exercised, this Court, as against the Crown, would not give any relief whatever. At all events, it is quite sufficient for me to say that the time for relief has passed. I think it very important that the Court should adhere to the principles of the statute, and although the words may not apply, there are many cases in which the Court has acted upon an analogy to a statute; for example, it has always considered twenty years as an insuperable bar to a claim, although there was no statute to that effect; and, acting upon analogy to the statute in this case, my opinion is that there is no right of relief against the Crown.

6 PC 357

Upon the whole case, therefore, I am of opinion that the Petition of Right must be dismissed.

Mr. *W. Karslake*:—In this case we must ask for the costs. In the case of *James* v. *The Queen* (2) the Court gave costs against the Crown.

The VICE-CHANCELLOR:—In that case I certainly gave costs against the Crown, and I do not see that I can do otherwise than give the costs to the Crown, when I decide the other way. The Petition will therefore be dismissed with costs.

Solicitors for the Suppliants: Messrs. *Ewbank & Partington.*
Solicitor for the Crown: Mr. *H. Watson.*
Solicitors for *B. Gwilliam*: Messrs. *Jones & Starling.*

(1) 1 Ball. & B. 367. (2) Law Rep. 17 Eq. 502.

PEARSON *v.* HELLIWELL.

V. C. M.
1874
July 7.

[1870 P. 152.]

Annuity—Corpus or Income—Deficiency of Income contemplated—Abatement directed.

Where an annuity is, by will, expressly charged on the *corpus* of an estate, subsequent words tending to shew that the testator contemplated that it should abate in the event of the income of the property being insufficient:—*Held*, not to deprive the annuitant of the right to have the *corpus* applied towards making good any deficiency of income to meet the annuity.

JOHN GIBSON, by his will, dated the 31st of October, 1859, after making some other dispositions, gave an annuity of £35 to his mother *Elizabeth Gibson* for her life, and another annuity of £35 to his wife for her life, and continued as follows:—

"And I charge the same annuities respectively upon all and singular my leasehold messuages, dwelling-houses, or tenements situate in *Sheffield* aforesaid hereinafter by me given and bequeathed."

The testator then gave his real and leasehold property to trustees, and after directing that they should hold it, in the first place, upon trust out of the rents, issues, and profits, to pay and keep down the interest of any mortgage which might be subsisting thereon, continued as follows:—

"And in the next place do and shall pay unto my said wife and mother their several annuities of £35 and £35 as and when the same shall respectively become due and payable: Provided nevertheless, and I declare and direct, that if the surplus rents and profits arising from the said leasehold premises remaining after making the several payments by me hereinbefore directed to be made shall prove insufficient to pay both the said annuities in full, then and so often as the same shall happen the annuity hereinbefore by me bequeathed to my said wife shall abate in favour of my said mother, it being my express desire that the said annuity to my said mother shall be paid in full to her during the remainder of her life."

The testator died on the 27th of May, 1860, and his mother died on the 5th of August, 1869.

The income of his estate had always been insufficient to pay

V.-C. M. 1874 PEARSON v. HELLIWELL.

both annuities in full, and at the date of the filing of the bill there was an arrear of more than £350 on account of the widow's annuity.

The testator's widow had married a second time, and again become a widow, and was the Plaintiff in the suit.

The suit now came on for further consideration, the property on which the annuities were charged being represented by a fund in Court.

Mr. *Dunning* (Mr. *Glasse*, Q.C., with him), for the Plaintiff:—

There is a distinct charge of the annuity upon the *corpus* of the estate, and that fact is sufficient to entitle the Plaintiff to have the *corpus* applied to make good the present arrears and the future payments so far as the income is insufficient.

Mr. *Ince*, for the Defendant, who was the surviving trustee and executor of the will:—

The words charging the annuities on the *corpus* must be read in connection with the subsequent part of the will, which shews a clear intention to make the annuities abate in case of the insufficiency of the income to meet them. In *Taylor* v. *Taylor* (1) the words were very similar to those here, but it was a stronger case than the present, because the charge there followed the words limiting the payment to the income, yet Vice-Chancellor *Hall* held that the income alone was applicable to pay the annuities. In *Foster* v. *Smith* (2) there was, as here, an actual charge on the *corpus*, cut down by subsequent words. It is sufficient to shew an intention that the fund out of which the annuity is payable should be preserved: *White & Tudor's* Leading Cases in Equity (3).

[THE VICE-CHANCELLOR:—*Phillips* v. *Gutteridge* (4) is rather like this case. There the annuities were held to be charged on the *corpus*.]

The decision in that case turned partly on the words "after performance of all the before-mentioned trusts."

It is not necessary to contend that the annuity to the mother was not charged. There is an express direction that the widow's annuity shall abate in case of insufficiency of income.

(1) Law Rep. 17 Eq. 324.
(2) 1 Ph. 629.
(3) 2nd Ed. vol. ii. p. 286.
(4) 3 D. J. & S. 332.

Mr. *R. Swan*, for the trustees.

SIR R. MALINS, V.C.:—

I am clearly of opinion that whenever annuities are given by a will, and there are added words such as those which occur in this will, "I charge the same annuities respectively upon all and singular my leasehold messuages, dwelling-houses, or tenements, situate in *Sheffield* aforesaid, by me given and bequeathed," the annuitant is entitled to resort to the *corpus* as well as to the income of the property so charged; and that, in order to exonerate the *corpus*, there must be a distinct statement that the annuity is to be paid out of the income and out of the income alone. The testator has not done that in the present case. He does not seem to have supposed that there would have been any deficiency of income to meet this annuity, and he disposes of the surplus rents and profits left after paying it. He has, however, expressly charged the annuities on the *corpus* of his estate, and I cannot, merely because he provides that if the surplus rents shall be insufficient to pay both annuities in full, that given to his wife is to abate in favour of his mother, infer an intention to make the annuities payable only out of income. There must be some distinct expression of an intention to limit the source of payment, and I can find none such here. If there was ever a case which exemplified this rule it is *Phillips* v. *Gutteridge* (1), where the words fell short of any such expression, and the *corpus* was made applicable to the payment of the annuities.

Mr. *Ince* cited *Taylor* v. *Taylor* (2), but the decision of the Vice-Chancellor in that case was that the annuities were not charged on the *corpus* at all. It, therefore, cannot be in any way an authority for a case where they are expressly charged.

The Plaintiff will, therefore, be entitled to receive her arrears out of the fund in Court, and to have the income and so much of the *corpus* as is from time to time required to make up the full amount of the annuity.

Solicitors: Messrs. *Pattison, Wigg, & Co.*; Messrs. *Doyle & Edwards.*

(1) 3 D. J. & S. 332. (2) Law Rep. 17 Eq. 324.

V.-C. M.
1874
July 8.

LE MARCHANT *v.* LE MARCHANT.

[1874 L. 80.]

Will—Construction—Precatory Trust—"In full confidence"—Trust for Children.

Gift by will to the testator's wife of all property whatsoever that he might die possessed of "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just and equitable spirit, and in such manner and way as she feels would meet with my full approval":—

Held, on demurrer, that the widow took a life interest, with a power of disposition amongst the children, the actual extent of which must be determined at the hearing of the cause.

DEMURRER.

This was a suit by one of the children of Sir *John Gaspard Le Marchant*, seeking to have the trusts of his will carried into execution under the direction of the Court. The Plaintiff was still an infant.

Sir *J. G. Le Marchant*, who died on the 6th of February, 1874, made his will, dated the 5th of August, 1871, which, so far as is necessary to be stated, was as follows:—

"I do hereby revoke and annul all former wills, and do now, in sound health and in the full possession of my faculties, do now (*sic*), on full and mature consideration, bequeath to my wife *Margaret Anne Le Marchant* all property whatsoever that I may die possessed of for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval."

The testator had four children besides the Plaintiff, three daughters, who were married, and a son who was of age.

A demurrer to the bill was filed by Lady *Le Marchant*, in order to raise the question whether she took under the will absolutely or subject to any trust for her children.

Mr. *J. Pearson*, Q.C., and Mr. *Kekewich*, in support of the demurrer:—

The question raised by this demurrer is very similar to that in

Lambe v. *Eames* (1), and the remark of the Lord Justice *James* in that case, that "the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed," is entirely applicable to the present case. The words used by the testator shew that he intended the administration of the estate to be left to his wife's discretion, and to be kept out of the control of the Court. The circumstances of the family are not altogether to be disregarded, and it is evident that the testator, after mature consideration, had determined to leave his estate at the entire disposal of his wife. There is the same distinction between this case and *Crockett* v. *Crockett* (2) which was pointed out by the Lord Justice *James* as existing in *Lambe* v. *Eames*. But perhaps the case most similar to the present is *Webb* v. *Wools* (3), where almost the same words were used, and it was held that the wife took absolutely. *Curnick* v. *Tucker* (4) is, no doubt, a decision the other way, but that case seems to be closely analogous to *Ware* v. *Mallard* (5), just as this is to *Webb* v. *Wools*. The use of the word "bestow" is an indication that the testator intended that Lady *Le Marchant* was to have power to distribute the estate as her own.

Mr. *Cotton*, Q.C., and Mr. *Vaughan Hawkins*, in support of the bill, were not called upon.

SIR R. MALINS, V.C.:—

This demurrer raises very important questions on the very short will of Sir *John Gaspard Le Marchant*, containing the following gift: "I do hereby revoke and annul all former wills, and do now, in sound health and in the full possession of my faculties, do now, on full and mature consideration, bequeath to my wife *Margaret Anne Le Marchant* all property whatsoever that I may die possessed of for her sole use and benefit." If the will had stopped there, nothing could be more distinct or admirable than the expression of the testator. But the difficulty is created by the words which he

(1) Law Rep. 6 Ch. 597; Ibid. 10 Eq. 267.
(2) 2 Ph. 553; 1 Hare, 451.
(3) 2 Sim. (N.S.) 267.
(4) Law Rep. 17 Eq. 320.
(5) 16 Jur. 492.

V.-C. M. 1874 LE MARCHANT v. LE MARCHANT.

adds: "In the full confidence that she will so bestow it on her decease to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval." If he intended to leave the property absolutely to her, why did he add those words? I come to the conclusion that his intention was that the property was to be for her own absolute use and benefit as long as she lived, and that she was also to have the power of bestowing it on her decease to his children. Mr. *Pearson* laid some stress on the word "bestow," but I think there can be scarcely a distinction between bestowing and appointing. On the question of what degree of disposing power he intended to confer, as, for instance, whether there was an exclusive power of appointment amongst the children, it is impossible for me to come to any conclusion in the present stage of the cause. If the demurrer is allowed, it will be on the ground that Lady *Le Marchant* is the absolute mistress of the property, to dispose of in any way she thinks fit. On the other hand, if the Plaintiff has an interest, that is, may be an object of the power, he will be entitled to an account, and the demurrer must be overruled.

All the cases that have been cited go to apply the reasonable rules of the Court for the purpose of ascertaining what is the intention of the testator. But after all it is but a question of intention. Now my decision in *Lambe* v. *Eames* (1), affirmed by the Lords Justices, was chiefly relied on; but I think that reference to the words there shews it to be a very different case from the present. Because the words there were, "to be at her disposal in any way she may think best for the benefit of herself and family." If it had been "for the benefit of the family" only, or "after her decease," I should be of opinion that there was a trust, and she could only have it for life, and then it must go to the family in any way she might think best.

The strongest case cited, which certainly struck me very much, is Sir *Richard Kindersley's* decision in *Webb* v. *Wools* (2). It certainly goes to an extent which rather surprises one, especially when the actual words are considered. They are practically the same as in this case. Because it is quite immaterial whether the words "in trust and confidence," or "in confidence" alone are

(1) Law Rep. 6 Ch. 597; Ibid. 10 Eq. 267. (2) 2 Sim. (N.S.) 267.

used. But the addition here of the words "on her decease" indicate that she herself, longer than her life estate, is not an object of the gift. She cannot bestow the capital upon herself and children. But in *Webb* v. *Wools* the widow was authorized to do more than that, because the Vice-Chancellor, after reading the first part of the will, says (1): "If the will stopped there, there could be no question. The will expressly declares that the parties to benefit are the wife, her executors, administrators, and assigns. There is a gift to her of the whole legal interest and of the whole beneficial interest; if she was alive at the time when the fund was realized it would go to her." Then he says: "The words immediately following in the will are these: 'Upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children.'"

Now, therefore, I think the circumstance that she was at liberty to dispose of the property after her death for the benefit of herself and children distinguishes that case from the present, because here Lady *Le Marchant* is not at liberty to dispose of it after her death for the benefit of herself, but exclusively for the benefit of the children.

I very much agree with what Vice-Chancellor *Hall* has said in the case of *Curnick* v. *Tucker* (2), in which the words of the will were: "I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." It may be said that there is an imperative duty to do justice to all, and equally, and all of them must have some share. But it is not stronger than this case. The Vice-Chancellor there says (3): "If this case had come before me after the decision of Vice-Chancellor *Kindersley* in *Webb* v. *Wools*, and before the decisions in the other cases referred to, I should have been disposed to hold that Mrs. *Tucker* took this property absolutely. In *Palmer* v. *Simmonds* (4), which was also before the Vice-Chancellor *Kindersley*, the gift was one of residue to the legatee, his heirs, executors, administrators, and assigns,

(1) 2 Sim. (N.S.) 268.
(2) Law Rep. 17 Eq. 320.
(3) Law Rep. 17 Eq. 322.
(4) 2 Drew. 221.

V.-C. M. 1874 LE MARCHANT v. LE MARCHANT.

for ever, for his own use and benefit, the testator having full confidence that if he should die without issue he would, after providing for his widow for her life, leave the bulk of such residue to the persons named equally; and the Vice-Chancellor expressed an opinion that, but for the uncertainty of the subject-matter of the gift, he should have considered himself bound by the authorities to hold that the legatee took only a life interest, with remainder to the children. That case is, no doubt, closely like the present, after eliminating the uncertainty of the subject-matter of the gift, which was one of the difficulties felt in that case; and I therefore think that the observations of the Vice-Chancellor *Kindersley* are strongly in favour of my holding that there is a trust in this case." He then cited other cases, and commented on *Lambe* v. *Eames*, which he distinguished on the ground that I have stated, and added: "I hold, therefore, that this is a gift to Mrs. *Tucker* for life, with a power of disposition amongst her children in her lifetime, or by deed or will, as she may think fit."

But really, independently of cases, what induces me to come to this conclusion is, that I am quite satisfied that it was the intention of the testator. I put the question during Mr. *Pearson's* argument, whether it would be consistent with the will that the widow (for I cannot advert to the circumstance of what her age may be) should take the whole of the testator's property, and on a second marriage settle it upon her second husband and any children she might be capable of having. Having regard to the words of the will, to say that Lady *Le Marchant* could give this property absolutely away from the testator's family, would, in my opinion, be deciding contrary to his manifest intention. Being, therefore, satisfied that his intention was that she was to have it for life only, with power of bestowing or appointing it amongst the children, all that is necessary for me to say now is that the children have an interest, and what that may be must be decided at the hearing of the cause.

The demurrer must therefore be overruled.

Solicitors: Messrs. *Freshfield & Williams;* Messrs. *Ouvry, Farrer, & Ouvry.*

In re HEDGES' TRUST ESTATE.

V.-C. M.
1874
July 10.

Will—Annuity—Deficiency out of Corpus—Income from all Sources—Express Exclusion from Computation.

A. gave by will an annuity of £1000 to his widow, and directed that in case of his estate being insufficient to make up her income from all sources to that amount, a sufficient part of the *corpus* to make up the deficiency should from time to time be sold.

B. subsequently by will gave her an annuity of £200, and directed that it should not be taken into account in regard to any other income, it being his express will and desire that it should be a clear beneficial addition to her income:—

Held, that the widow was not bound to include the £200 annuity in her computation of income, and was entitled to have a sufficient amount of the *corpus* sold to make up her income, independently of that annuity, to £1000.

THIS was a Petition for the advice of the Court.

William Killingworth Hedges, by his will dated the 23rd of June, 1851, gave to his wife *Harriet Hedges* £2000, and certain specific legacies, and other benefits, including the option of residing rent free in a particular house, or receiving an annuity of £100 a year as an equivalent; and the testator, after all the personal legacies were fully discharged, bequeathed the remainder of his property wheresoever employed, also the policies of insurance on his life, with accumulations, to his executors and trustees in trust, and from the annual income or interest willed and bequeathed, in addition to the £100 per year to be paid for the rent of the then present or future residence of his said wife (as long as she remained his widow), a further annuity of £1000 per year, to be paid quarterly from the time of his decease. The will then contained the following provision: "But should from any circumstances there not be sufficient interest to pay it, then as long as she remains my widow, and annually certifies in writing what income she derives from any property she may inherit, I hereby fully authorize my executors for the time being annually to dispose and sell such a part of the principal of my residuary estate as to make up, including the interest on the property she may

V.-C. M. 1874 — *In re* HEDGES' TRUST ESTATE.

inherit, the aforesaid annuity (£1000), the same to be for her own absolute benefit and free disposal."

The testator died on the 21st of October, 1852. The income of his residuary estate was insufficient to produce the annuity of £1000, and portions of the capital were from time to time sold to make up the deficiency. Subsequently, Mrs. *Hedges* acquired property from other sources, for the income of which she duly accounted, but there was still an annual deficiency, which was made up in the same way.

William Hedges, the father of the testator *William Killingworth Hedges*, by his will, which was dated the 29th of June, 1866, gave Mrs. *Harriett Hedges* an annuity of £200 for life, and a legacy of £1000; and by a codicil to his will, dated the 22nd of November, 1869, after reciting the gift to Mrs. *Hedges* of the annuity and legacy, he provided as follows:

"Now I declare the same shall be in addition to any income or benefit which she may derive from any other source, and shall not be taken into account in regard to any other income, it being my express will and desire that such annuity shall be a clear beneficial addition to her, in consequence of my love and affection for her, and of my entire approval of her parental kindness towards her children *Harriett K. Hedges* and *Killingworth William Hedges*, they being my grandchildren."

William Hedges died on the 9th of February, 1872, and the legacy and annuity had been paid to Mrs. *Hedges*.

The present petition was presented by the executors of *William Killingworth Hedges*, and asked the advice and direction of the Court "as to whether they might concur with Mrs. *Harriett Hedges* in selling a subsequent portion of the *corpus* of the testator's estate to make up the amount of the annuities given by the will of *William Killingworth Hedges* to Mrs. *Harriett Hedges*, without taking into account the interest which she took under the will of *William Hedges*, the father, and whether she was bound to include such interest in the annual certificates to be made out by her to the Petitioners."

Mr. *W. F. Robinson*, for the Petitioners:—

The question is not whether Mrs. *Hedges* has a right to receive a

larger income than £1000, but whether the power to sell the *corpus* arises except when all sources of income are taken into account.

Mr. *Karslake*, Q.C., and Mr. *Knox*, for Mrs. *Hedges*:—

The second testator has shewn a clear intention as far as he can that the benefits he has conferred are not to diminish those which Mrs. *Hedges* derived from his son. He has given an express direction that the gifts made by his will are to be an addition to what Mrs. *Hedges* receives from other sources, and it would be absurd to put such a construction upon the words of the first testator's will as would take away on one side what was given on the other.

Mr. *Robinson*, in reply.

SIR R. MALINS, V.C.:—

It may be open to question whether this point is properly the subject of a petition for the advice and direction of the Court. It is one by no means free from difficulty: [His Honour then read the testamentary dispositions above set forth, and continued:—]

It is perfectly clear that the first testator intended Mrs. *Hedges* to certify whatever income she derived from every source whatever. Then the father, knowing that his son had made this provision, clearly shews that he intended her to have the benefits given by his will in addition to those which she derived from the son. It is clear, therefore, that to bring this annuity of £200 a year into account in computing the amount payable to her out of the son's estate would disappoint the intention of the father. On the whole, I think it is right that she should have the £200 a year in addition to her other income, and I hold that she may certify the amount of her income without including it.

Solicitors: Messrs. *Combe & Wainwright.*

V.-C. M.
1874
July 22.

TICKNER *v.* OLD.

[1872 T. 134.]

Tenant for Life and Remainderman—Conversion—Wasting Securities—Long Annuities—Enjoyment in Specie—Following Assets—Recouping by Tenant for Life paid in excess.

A testator gave his residue to trustees on trust to convert and invest on Government or real securities, and to pay the income to his wife for life, and after her death to distribute the *corpus*, and he also empowered them to continue invested any of his Government stocks or real securities, and directed that his wife should be entitled to the interest, dividends, and annual proceeds of his residuary estate as from the day of his decease:—

Held, that the trustees were, under the will, empowered to retain such Government securities only as were of a permanent character; that certain long annuities, which formed part of the testator's estate, ought to have been sold and the proceeds invested on permanent securities; and that the widow's estate was after her death liable to recoup to the testator's estate the amount which would have been produced by the sale of the long annuities, she having received in her lifetime the whole proceeds till they expired.

THIS was the hearing, on further consideration, of a suit for the administration of the estate of Mrs. *Jane Hewitson*, who, by her will, which was dated the 2nd of March, 1872, after reciting that by the will of her late husband, *John Bridgman Hewitson*, she had power to appoint by will a sum of £1000 consols, appointed the same, and gave her residuary estate to the Defendants *Trenham Old* and *Alfred Henry Turner*, upon trust to sell and convert and pay a legacy of £500 to the Plaintiff, and to divide the residue amongst certain nephews and nieces therein referred to.

The Chief Clerk, by his certificate, amongst other things, stated as follows:—

"*John Bridgman Hewitson*, the husband of the testatrix, by his will, dated the 17th of February, 1842 (amongst other things), gave unto and to the use of his said wife, *Jane Hewitson*, and *Henry Mills* and *Trenham Old*, the younger, all the residue of his property whatsoever, both real and personal, upon trust forthwith to sell and convert the same into money, and after payment thereout of his funeral and testamentary expenses and debts, and

the costs of sale and conversion aforesaid, to invest the residue of the moneys arising from the sale in the names of the said trustees or trustee at interest upon Government or real securities in *England* and *Wales*, and to pay the interest, dividends, and annual proceeds of such trust moneys, stocks, funds, and securities unto and permit the same to be received by his said wife during her life; and from and after her decease the testator directed that his said trustees should stand possessed of and interested in the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual proceeds thereof upon such trusts as are in his said will mentioned; and the said testator in and by his said will directed (amongst other things) that all moneys due and owing to him at the time of his decease should be invested in the same manner and on the same trusts as the moneys arising from the sale and conversion of his residuary estate thereinbefore directed, and that his trustees might continue invested any of his Government stocks and real securities, or vary and transpose the same, and also the stocks, funds, and securities in which they might invest his other estate. And he also directed that his said wife should be entitled to the interest, dividends, and annual proceeds of his said residuary estate from the day of his decease."

He also appointed the testatrix and *Henry Mills*, and the Defendant *Trenham Old*, his executors. He died on the 18th of June, 1852, and his will was proved by the two executors alone, power being reserved to the testatrix to prove also, which she never did.

It also appeared from the Chief Clerk's certificate that at the death of the testator his personal estate comprised, amongst other things, certain sums of Consolidated Reduced and $3\frac{1}{4}$ per Cent. Annuities, and £100 per Annum Consolidated Long Annuities for eighty years, from the 5th of January, 1780, which at his death stood in his own name.

On the 25th of April, 1854, these long annuities were transferred into the joint names of the testatrix and the acting executors, and she continued to receive the half-yearly payments on the annuities, sometimes personally and sometimes through the Defendant *Old*, till they expired in January, 1860.

The Chief Clerk found, by his certificate, that the value of the

V.-C. M. 1874 TICKNER v. OLD.

long annuities if they had been sold in due course by the executors would have been £706 5s., and he reserved for the Court the question, whether, having regard to the whole contents of the testator's will, Mrs. *Hewitson* was entitled to receive, as she did, the half-yearly payments upon them from time to time, in specie, from the time of the testator's death till their termination, or whether they ought not to have been converted on the death of the testator and the proceeds invested as part of his residuary personal estate, and whether Mrs. *Hewitson's* estate was liable to make good to the testator's estate the value of the long annuities, as if they had been converted on the testator's death.

The parties interested in the testator's estate were not before the Court, but the Defendant *Old*, as the surviving executor and trustee of the testator, sought to have refunded to him a sufficient part of the testatrix's estate to answer his liability to the present beneficiaries under the will.

Mr. *Bristowe*, Q.C., and Mr. *W. R. Ellis*, for the Plaintiff:—

The long annuities were certainly investments on Government security, and the testator has empowered the trustees of the will to retain such investments. Under these circumstances they were justified in allowing the widow to receive the annuities without having them converted: *Brown* v. *Gellatly* (1).

They were then stopped by the Court.

Mr. *Morgan*, Q.C., and Mr. *Walker*, who appeared for persons in the same interest who had come in under the decree, were not called upon.

Mr. *Bush* appeared for parties in the same interest, and referred to *Hinves* v. *Hinves* (2).

Mr. *W. Pearson*, Q.C., and Mr. *Simmonds*, for the Defendants:—

It is a settled rule that where part of a testator's property is of a wasting character the Court requires it to be converted, unless there is a distinct intimation that he intended it to be enjoyed in

(1) Law Rep. 2 Ch. 751.

(2) 3 Hare, 609.

specie: *Howe* v. *Earl of Dartmouth* (1). It is equally well settled that where there is a power to retain existing securities but no express power of enjoyment in specie, a right to receive the income extends to so much only as would have been derived from a permanent investment. The person claiming to enjoy in specie must shew his right affirmatively, *Dimes* v. *Scott* (2), and in express words: *Re Llewellyn's Trusts* (3); *Anderson* v. *Read* (4).

[The VICE-CHANCELLOR referred to *Lord* v. *Godfrey* (5).]

There was no trust for conversion in that case. Moreover it was a case as to leasehold property merely, and *Blann* v. *Bell* (6) shews that there may be a distinction between taking the rents of leaseholds and receiving the income of funds allowed to remain invested in an unauthorized manner. The clause as to enjoyment of income only fixes the time from which the receipt of income was to commence. The third point determined in *Brown* v. *Gellatly* (7), supports this view. The testator must be presumed to mean the same thing when he directs investments to be made in Government stock, and where he alludes to existing investments of the same kind.

Mr. *Bristowe*, in reply:—

The testator must have had in his mind the fact of being possessed of long annuities. His primary intention was to benefit his widow, by letting her have the income of existing securities. To exclude the rule in *Howe* v. *Earl of Dartmouth* it is only necessary to shew an intention to allow funds to continue in their actual investments. The last clause of the will shews that the testator contemplated that his widow would enjoy the income of all his property as it was invested at his death.

SIR R. MALINS, V.C.:—

The manner in which this case comes before me is very curious because the point is argued by a trustee who comes forward to say he has committed a breach of trust.

(1) 7 Ves. 137.
(2) 4 Russ. 195.
(3) 29 Beav. 171.
(4) 22 W. R. 527.
(5) 4 Madd. 455.
(6) 2 D. M. & G. 775.
(7) Law Rep. 2 Ch. 751.

V.-C. M. 1874 TICKNER v. OLD.

[His Honour then referred to the terms of the will, and the other facts of the case, and continued :—]

If the will had stopped without empowering the trustees to retain existing investments, the case would have been too clear for argument. The rules of the Court admit of no doubt, and are those of common sense. When a man gives a life interest to one person, followed by a gift of the *corpus* to others, it is presumed that he intends to benefit both, and if his estate comprises perishable property, it is the duty of those to whom the administration of the estate is committed to convert the estate and invest it on permanent securities. That was the rule laid down in *Howe* v. *Earl of Dartmouth* (1), and it is the only rule consistent with common sense and justice, and must be applied, unless the testator has shewn that he does not intend that a conversion shall be made as against the tenant for life.

What is required to constitute such an expression of intention is exemplified by the case of *Vaughan* v. *Buck* (2), where a testator began his will by bequeathing the whole of his property to his wife for life, and directed it to be afterwards equally divided between his children. It happened that further on in the same will he alluded specifically to a leasehold house, as if it would remain part of his estate, to be enjoyed by his widow, and that was treated as an indication that he intended it to be held in specie, and it was allowed to remain unconverted and the rents to be received by his wife during her life.

Now, therefore, the rule being so clear, it is said that this testator must have known that the long annuities were Government securities, and when he empowered his trustees to continue his investments on Government securities there must be attributed to him the knowledge that his wife would be entitled to receive the annual payments on the long annuities as part of her income whilst they lasted. But the testator has, in the first instance, expressly directed the sale and conversion of his estate, and consequently the stress of the argument, on the part of those who support this contention, turns upon the subsequent words. Now what did he mean by empowering his trustees to continue his investments on Government securities? One view is that he

(1) 7 Ves. 137. (2) 1 Ph. 75.

intended them to retain his long annuities. On the other side it is said that he only referred to stocks of a permanent character.

In order to decide this question the whole scope of the will must be looked at. Suppose the testator had possessed nothing but long annuities, the view that he intended his widow to receive the whole in specie could not be sustained. And if this construction could not be supported as to the whole of the estate, it is impossible that it could be maintained as to part. If the whole of the estate had been so invested the widow might have been left in a very unfortunate position. She might have gone on receiving the long annuities, and spending them till they expired, and then have been left destitute.

I am clearly of opinion that the intention of the testator was, that these long annuities should be converted, and the proceeds put into securities of a permanent nature. By the expression "Government securities," he must have intended such as were consistent with the objects of the will. He intended the widow to have the whole for her life, and that after her death it should go in its entirety to the persons to whom he bequeathed it. I agree with Mr. *Simmonds'* remark, that where an expression is used twice in a will it must be presumed that the second time of using it he intended it to have the same meaning which it clearly bore the first time he used it. I acted myself upon this view in *Webber* v. *Corbett* (1). Therefore, when the testator speaks of continuing investments in Government stocks, I consider that he means those of a permanent nature on which he had in the former part of the will directed that his estate should be invested. I think, therefore, that he intended them to convert his long annuities. Mr. *Bristowe* says this view is inconsistent with the direction that the income is to be received by the widow from the date of his death. I think, however, that he only means that she is to come into the enjoyment of the property as from the time of his death. In my opinion, therefore, it was the duty of the trustees to convert the long annuities, and as the widow benefited by their failing to do so, her estate must recoup what would have been produced by the sale and conversion.

Solicitors: Mr. *Henry Hill;* Messrs. *Brooks & Co.;* Messrs. *Symes, Sandilands, & Humphry.*

(1) Law Rep. 16 Eq. 515.

V.-C. B.
1874
June 4.

In re FREEHOLD AND GENERAL INVESTMENT COMPANY.

GREEN'S CASE.

Company—Contributory—Director—Qualification—Withdrawal from Office—Lapse of Time.

20 L. 507.
7 Ch. D. 135

In March, 1865, *G.* was asked by the Board to become a director of a limited company. He attended two board meetings in March and April and signed the attendance book. He also saw and permitted to be issued in April, for the purpose of raising further capital, a prospectus, in which his name appeared as a director of the company. On the 4th of May *G.* wrote to say that as his name had been of no assistance to the company he would withdraw. On being afterwards asked by the secretary to qualify as director, he wrote on the 2nd of June to say that if the secretary considered he (*G.*) remained as director of the company, he (*G.*) begged leave again to withdraw; and that he had no intention of departing from his letter of earlier date. *G.* never received any director's fees; he did not expressly agree to take, nor did he apply for any shares, and none were ever allotted to him; nor was any further step taken until the winding-up of the company in 1870. No application was made against *G.* in the winding-up until the year 1874.

The Court having found upon the facts that *G.* never had a fixed intention of becoming a director, though for some weeks he was so called:—

Held (independently of the lapse of time), that *G.* was not liable to be placed on the list of contributories for the qualification number of shares; and summons of official liquidator, seeking to have him settled on the list, dismissed, but without costs.

ADJOURNED SUMMONS on behalf of the official liquidator of the *Freehold and General Investment Company, Limited,* to have the name of *William Green* settled on the list of contributories in respect of twenty director's qualification shares in the company.

The company was incorporated by registration under the *Companies Act,* 1862, on the 7th of June, 1864. By the articles of association nine first directors were appointed. By the 70th article the qualification of a director was declared to be the holding of at least twenty shares in his own right in the capital of the company; and by the 71st article the directors so appointed had power to appoint any other persons as directors, so that the number did not exceed twelve.

On the 2nd of March, 1865, at a meeting of directors, it was

resolved, with a view to a further issue of shares, that *Green* (who was one of the promoters of the company) and two others should be invited to become directors; and at another meeting, on the 3rd, it was resolved that *Green* and the two others be elected directors, subject to their assent. At the same meeting, and at another meeting on the 7th of March, the draft of a prospectus relating to this further issue of shares was considered by the board, and was referred to *Green* and others for amendment.

From the attendance and agenda books of the company it appeared that on the 17th of March *Green* attended a board meeting and signed the attendance book. No mention of the fact appeared on the minute book.

From all three books it appeared that on the 7th of April *Green* attended a board meeting and signed the attendance book.

The prospectus above referred to had the name of *William Green* printed in the list of directors. It was circulated between the 13th and 24th of April, but whether to any beyond a very limited extent, was not clear on the evidence; and during that time thirteen applications were made for 149 shares in the company.

On the 3rd of May, 1865, the secretary, Mr. *R. N. Collier*, wrote to *Green*, informing him that a board meeting was to be held on the 5th, and requesting his attendance.

On the 4th of May *Green* wrote to the secretary as follows:—

"Messrs. *Green*, Estate Agents and Auctioneers,
"28 *Old Bond Street*, W.,
"4th May, 1865.

"Dear Sir,—As from what I can learn of the result of your appeal to the public, my name has been of no assistance to the company, I feel it will be of but little use my sitting at the board, therefore, with every wish for the satisfactory progress of the undertaking, I beg leave to withdraw, and in so doing I must express my regret that my name has been of such little service."

The secretary entered this letter in the agenda book as a matter to be brought before a board meeting, and opposite to the entry appeared in the book, in the handwriting of the chairman, the word "read." This word had been erased, and over and in substi-

V.-C. B. 1874 GREEN'S CASE.

tution for it appeared, in the secretary's writing, the word "withdrawn." The secretary, in an affidavit made in February, 1874, said that at that distance of time he could not distinctly recollect the circumstances, but he was certain he was informed either by *Green*, or by his son, or partner, that *Green* "withdrew the letter."

From the agenda and minute books it appeared that *Green* attended another board meeting on the 12th of May, 1865.

On the 30th of May, the secretary, acting under instructions from the board, wrote to *Green* as follows:—"As the annual general meeting of the shareholders in this company will be held on Tuesday, the 6th of June, I am directed to say it is highly desirable you should qualify as a director before that date."

On the 2nd of June, 1865, *Green* answered as follows:—

"I have to acknowledge the receipt of your letter of the 30th ult., from which I infer that you consider I remain as a director of the company. If so, I beg leave again to withdraw my name, as, beyond allowing it to remain at the request of Mr. *Stanley* until after the allotment of shares had been made (it being considered possible that some of the applications might have been received through the publication of my name in the advertisements), I had no intention of departing from my letter of earlier date in which I withdrew from the board."

On the 9th of June the secretary wrote again:—"Our solicitor, Mr. *Evans*, having reported to the board that you had on his explanation promised to qualify as a director of this company, I am instructed to ask if you will kindly carry out the arrangement."

On the 10th of June, *Green* wrote to the secretary, referring to other business, but making no mention of the question as to qualification for directorship.

On the 27th of May, 1870, the company was ordered to be wound up.

Mr. *Green*, by his affidavit, said that, when invited, he declined to become a director or to accept any shares in the company until he had ascertained by inquiry its position; and that he attended the board meetings at which he attended, as a visitor only. He saw the prospectus, but never advertised it or circulated any copies of it. In May, 1865, he told the secretary he would not be a

director; he never applied for or agreed to take any shares, and none were ever allotted to him. He never acted as a director or took any director's fees.

Mr. *W. Pearson*, Q.C., and Mr. *North*, for the official liquidator:—

The cases upon which we rely are, *Kincaid's Case* (1); *Fowler's Case* (2); *Harward's Case* (3); *In re Disderi & Co.* (4); and *Brown's Case* (5), in which Lord *Selborne*, C. (6), enunciates the latest exposition of the law upon this subject.

Our contention upon the facts is, that *Green* accepted the office of director; and we then say that if he accepted, he is liable for the qualification number of shares, whether any shares were allotted to him or not.

In the *Marquis of Abercorn's Case* (7), which will be cited against us, the taking of shares was not a necessary part of the qualification of a director; and it was a case under the Act of 1844, where the rights of creditors were different from what they are under the Act of 1862. In *Currie's Case* (8) the *Marquis of Abercorn's Case* was distinguished.

Leeke's Case (9), which was very similar to the present, was affirmed on appeal (10).

Mr. *Romer*, for Mr. *Green*:—

No case has gone so far as to fix a man with responsibility under circumstances like these. There was no agreement to take shares, no application for shares, no allotment, no taking of director's fees. Strictly, nothing occurred, either before or since the winding-up, after the 2nd of June, 1865, when Mr. *Green*, for the second time, refused to have anything to do with the directorship.

Assuming that Mr. *Green* did, for a few weeks, act as director, it is now the law that the merely acting as a director will not of itself be sufficient to make a man liable for a number of shares equal to the qualification number.

(1) Law Rep. 11 Eq. 192.
(2) Ibid. 14 Eq. 316.
(3) Ibid. 13 Eq. 30.
(4) Ibid. 11 Eq. 242.
(5) Ibid. 9 Ch. 102.
(6) Law Rep. 9 Ch. 107.
(7) 4 D. F. & J. 78.
(8) 3 D. J. & S. 367.
(9) Law Rep. 11 Eq. 100.
(10) Ibid. 6 Ch. 469.

V.-C. B. 1874 GREEN'S CASE.

The *Marquis of Abercorn's Case* (1) has always been followed, except where there have been additional circumstances to distinguish the particular instance; and no reason has been given by the other side why the differing circumstances here should lead to a different conclusion: *Tothill's Case* (2); *Chapman's Case* (3); *Roney's Case* (4); and *Brown's Case* (5), which is clearly in Mr. *Green's* favour. The other cases are all distinguishable.

Upon the facts it is clear that Mr. *Green* attended only to see if he should like to be a director, and seeing, refused; thus bringing the case within the principle of *Austin's Case* (6), which was decided precisely on this ground; *Re Imperial Land Credit Company* (7) also applies.

Independently of the above, the official liquidator is out of Court from laches: *Brotherhood's Case* (8).

Mr. *Pearson*, in reply.

[*Sidney's Case* (9) was referred to.]

SIR JAMES BACON, V.C.:—

I think it would be the most unreasonable and most unlawful thing in the world that I should accede to the request of the official liquidator in this case—unreasonable in the highest degree, because it is not until nine years after this communication by letter that there is any suggestion that Mr. *Green* was a director. The winding-up has been going on for five years; the official liquidator has had an opportunity of looking into all these matters, reading all these books, knowing all these transactions, and has had the valuable assistance of the secretary whose affidavit now is the principal support of the application before me. When I say it would be unreasonable, I do not mean there is any statute of limitations or any positive rule applicable to the case; but it would be highly unreasonable to rip up a matter of this kind at the end of ten years.

But, putting that aside, my opinion is, that there is no ground in

(1) 4 D. F. & J. 78. (2) Law Rep. 1 Ch. 85. (3) Ibid. 2 Eq. 567. (4) 4 D. J. & S. 426. (5) Law Rep. 9 Ch. 102. (6) Ibid. 2 Eq. 435. (7) 16 W. R. 1191. (8) 4 D. F. & J. 566. (9) Law Rep. 13 Eq. 228.

law for what has been argued. Cases have been referred to, and there have been various expressions of different Judges in those cases; but the worst of it is, that in the judgments which Judges pronounce, this is inevitable, that, having their minds full, not only of the cases before them, but of the principles involved in the cases which have been referred to, it very often happens that a Judge, in stating as much as is necessary to decide the case before him, does not express all that may be said upon the subject. That leaves the judgment open sometimes to misconstruction, and enables ingenious advocates, by taking out certain passages, to draw conclusions which the Judge never meant to be drawn from the words he used. But among all these instances, has any case been mentioned in which a man has been fixed as a director, or shareholder, or anything else, where there has not been a contract between the parties on which to base it? In *Kincaid's Case* (1), and every other case, there has been either a contract to sustain some character, or a subscribing of an instrument, or the entering in some way into an agreement on which a liability can be fastened.

In this case there is not the beginning of any such thing. Of all the cases that have been decided, *Austin's Case* (2) seems to me to be the most like this. I do not forget what has been argued about the *Marquis of Abercorn's Case* (3), because that is valuable on principle, and lays down plainly that you shall not fix a man as director of a company who has never meant to assume that character. If he has called himself by the name—if for the purposes then contemplated by him and the persons with whom he was then in connection, he has called himself director, that is not, within the *Marquis of Abercorn's Case*, a serious fixed intention to become a director.

In this case, it is not suggested that any creditor has been misled, or any co-director misled, or anybody imposed upon by the fact that for a certain number of days or weeks this gentleman was called a director. All that is made out on the evidence is that which Mr. *Green* himself furnishes. He says, "There being a company in contemplation, I, being selected to become a director,

(1) Law Rep. 11 Eq. 192. (2) Law Rep. 2 Eq. 435.
(3) 4 D. F. & J. 78.

V.-C. B. 1874 GREEN'S CASE.

being under no obligation to become one, said I would look into the matter, and, if I liked it—if I was satisfied with the prospects of the concern—I would at some future time become a director." He says they were glad to avail themselves of his assistance and his name. The prospectus was prepared; he appears as a director in it; he attends the meetings always on this conditional agreement, that, if in the result he is not satisfied with the prospects of the company, he will not have anything to do with it; and then, by the plainest intimation that can be conceived, he says to the company: "All the assistance you have been able to derive from the use of my name seems to have been of no avail; if it has been useful to you I am very glad of it, but for the future we break off here" (I am not using his words), "I should have become a director if it had pleased me, but I am not satisfied, and will not be a director." Then, not being understood by the secretary, who comes to the front again, he is compelled to say: "You shall not misunderstand me, I will have nothing in the world to do with it, I withdraw altogether." That letter is read at a meeting. Then comes an unsatisfactory part of the case, because when the chairman writes "read" against that letter, where it is entered in the minute book, his secretary writes "withdrawn" over the word "read," and nine or ten years after this the secretary mixes up what he thought then with what he knows now. I cannot give attention to that. The correspondence is clear, distinct, and specific. Mr. *Pearson* reproaches Mr. *Green* that, when a letter was written asking him to qualify himself as a director, he, having to answer that letter, answers the other part and remains silent as to the qualification. I think that was about as prudent and proper a course as could be suggested. He had been asked before, and he sent to say "I withdraw." He is asked a second time, and says "I will withdraw." Then comes the secretary, and says, "Qualify yourself as a director," and he says nothing. I think he acted very rightly.

Now, as to the acts as director which are so much insisted upon, there being no trace of a reason why he should be a director except that which one can draw from his own affidavit, that he agreed to come in for a time—compare that with what was done

in *Austin's Case* (1). *Austin* went to the board, sat with the board, signed the cheques, acted in a substantial way as a director, and shares were allotted to him—none of which things took place in this case—and when they were allotted, they were sent back again by him, he saying, "As to holding any shares, I will have nothing to say to it." That was held to be perfectly right on his part, and the attempt to fix him with the shares utterly failed. That case, with the *Marquis of Abercorn's Case* (2), and the observations made in *Brown's Case* (3), seem to me to be the only authorities that are worth considering on this occasion, because in all the others there was either subscription to an agreement, or some plain, independent, separate contract, something which constituted the relation of shareholder between the company and the person who was afterwards fixed as director. In this case there is not a particle of anything of the sort. The persons who had the conduct of the company knew he was not a director; for the five years during which they carried on business they acted on that assumption; and, for the five years or nearly the five years which have elapsed since they have lost all control over it, it has been in the hands of an official liquidator, who has never thought of making the claim till now.

The summons must be dismissed; but Mr. *Green* must pay his own costs of this application. Since he has chosen to play with the fire in this way, if he has burnt his fingers, so much the worse for him. The official liquidator may take his costs out of the estate.

Solicitor for the Official Liquidator: Mr. *W. Moon.*
Solicitors for Mr. *Green*: Messrs. *Hunter, Gwatkin, & Co.*

(1) Law Rep. 2 Eq. 435. (2) 4 D. F. & J. 78.
(3) Law Rep. 9 Ch. 107.

V.-C. B.
1874
May 23.

In re VIANT'S SETTLEMENT TRUSTS.

Marriage Settlement—Covenant to settle future Property.

A widow entitled to a life interest in a fund, and also to a moiety of the capital, subject to her own life interest, married again. By the settlement on the second marriage her life interest was settled, and she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled:—

Held, that the words of futurity were satisfied in respect of the husband's interest, and that the moiety of the fund was subject to the covenant.

2 Ch D 364-5
3 Ch D 789
6 Ch D. 621-3.
624,

PETITION.

By a settlement dated the 27th of July, 1857, and made prior to the marriage of *Arthur John Hawkins* and *Sarah Albinia Eldridge*, several items of property (including the proceeds of a policy of assurance which had been effected by *Arthur J. Hawkins* on his own life) were assigned to *Robert Davis*, *Charles Hawkins*, and *John Fooks*, upon trust that they should pay the annual income "during the joint lives of the said *Arthur J. Hawkins* and *Sarah A. Eldridge* to the said *Sarah A. Eldridge* for her separate use, independently of the said *Arthur J. Hawkins* and of his debts, control, and engagements," her receipts alone to be discharges, and she not to have power to deprive herself of the benefit thereof by way of anticipation; after her death, in case *Arthur J. Hawkins* should then be living, upon certain trusts for his benefit; and after the death of *Sarah A. Eldridge*, and the determination of the trust thereinbefore declared for the benefit of *Arthur J. Hawkins*, the trustees were to stand possessed of the capital for the benefit of the children of the marriage as therein mentioned, and if there should be no child of the marriage who should attain a vested interest, then after the death of *Sarah A. Eldridge*, and such default or failure of children, which should last happen, the trustees should stand possessed of the said capital "in trust for the said *Arthur J. Hawkins*, his executors, administrators, and assigns."

Arthur J. Hawkins died on the 26th of November, 1869, intestate, never having had issue of the marriage, and leaving his father,

Not followed Re Jones 2 Ch D. 362 MR

William Hawkins, and his widow, *Sarah Albinia Hawkins*, him surviving.

On the 21st of January, 1860, administration of the personal estate and effects of *Arthur J. Hawkins* was granted to his widow.

Payment of the policy moneys was obtained by *R. Davis*, *C. Hawkins*, and *J. Fooks*, and the balance of the proceeds was invested by them in the purchase of £2084 11*s.* 9*d.* consols.

In August, 1866, the widow married again, and by a settlement, executed shortly before the marriage, dated the 9th day of August, 1866, and made between *John Viant*, the intended husband, of the first part, *Sarah Albinia Hawkins* of the second part, and *John Tizard* and *Arthur Leonard Cooper* of the third part, after reciting that Mrs. *Hawkins* was entitled to, amongst other property, "a life interest in the annual income of the sum of £2084 11*s.* 9*d.* £3 per Cent. Consols standing in the names of *Robert Davis*, *Charles Hawkins*, and *John Fooks*;" and the intended marriage; and that upon the treaty for the said marriage it was agreed that Mrs. *Hawkins* should convey and assign two mortgage debts and the securities, "and the annual income to be derived from the said sum of £2084 11*s.* 9*d.* £3 per Cent. Consols, unto" *J. Tizard* and *A. L. Cooper*, and also transfer other property into their names, and that they should stand possessed of and interested in the mortgage debts and interest, "and the annual income to be derived from the said sum of £2084 11*s.* 9*d.* £3 per Cent. Consols," and the other sums, "and all other sum and sums of money which the said *Sarah A. Hawkins* shall become entitled to during her said intended coverture, as hereinafter mentioned," it was witnessed that, in pursuance of the said agreement, and in consideration of the said intended marriage, it was thereby agreed and declared that *J. Tizard* and *A. L. Cooper* should stand possessed of the mortgage debts and securities, and the capital sums of stock (not mentioning among such capital sums the above sum of consols), "and the annual income to be derived from the said sum of £2084 11*s.* 9*d.* £3 per Cent. Consols, and all other sum and sums of money to which the said *S. A. Hawkins* might become entitled, as hereinafter declared," in trust, after the marriage, at their discretion to sell the specified capital sums of stock, and invest the proceeds, and vary the

V.-C. B. 1874

In re VIANT'S SETTLEMENT TRUSTS.

securities, and stand possessed of the said trust funds, and the annual income thereof, "as well as of the said sum of £2084 11*s.* 9*d.* so standing in the names of the said *R. Davis, C. Hawkins,* and *J. Fooks,*" upon trust to pay such income during the joint lives of *J. Viant* and *Sarah A. Hawkins,* to *Sarah A. Hawkins* for her separate use, without power of anticipation; and after her death, if *J. Viant* should be living, to pay the income of the said trust funds then remaining to, or permit the same to be received by, *J. Viant* during his life, or until he should do some act, or some event should occur whereby or in consequence whereof the said annual income, or some part thereof, if payable to himself, might become vested in some other person or persons, or some other person or persons might become entitled to receive the same; then the said trust moneys to remain in the hands of the said trustees upon the trusts of that indenture; and after the death of *Sarah A. Hawkins,* and the determination of the trust thereinbefore declared for the benefit of *John Viant,* the trustees were to stand possessed of "all and singular the said trust moneys and premises, and the annual income thereof," in trust for the children of the marriage as therein mentioned, with powers of advancement, maintenance, and education; and an ultimate trust, in default of children, if *Sarah A. Hawkins* should survive *J. Viant,* in trust for her absolutely, or in such manner as she should by will or codicil direct or appoint; but if she should die in the lifetime of *J. Viant,* then (subject to the before-mentioned trust in favour of *J. Viant*) in trust for "the person or persons who, under the statute for the distribution of the estates of intestates, would at the time of the decease of the said *Sarah A. Hawkins* be entitled to her personal estate."

The deed also contained the following clause:—

"And the said *J. Viant* and *S. A. Hawkins,* for themselves, their heirs, executors, administrators, and assigns, do hereby covenant with the said *J. Tizard* and *A. L. Cooper,* their successors, executors, administrators, and assigns, that if the said *S. A. Hawkins* or the said *J. Viant* in her right shall, at any time or times during the coverture between them the said *S. A. Hawkins* and *J. Viant,* become entitled to any sum or sums of money and personal estate whatsoever, under the provisions of a certain deed of settlement

bearing date on or about the 27th day of July, 1857, and made between" (describing the parties) "they the said *S. A. Hawkins* and *J. Viant*, shall and will, immediately upon her, his, or their becoming possessed of or entitled to the same personal estate, as far as she, he, or they lawfully or equitably can or may, at the costs of such newly-acquired personal estate, by all proper acts, deeds, assignments, and assurances in the law, assign, settle, and assure the same personal estate upon and for the several trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements hereinbefore contained of and concerning the personal estate and property of her the said *S. A. Hawkins* hereby assigned and settled, in manner aforesaid, any law to the contrary notwithstanding."

On the 4th of April, 1873, *J. Tizard* died, and by a deed dated the 16th of May, 1873, *George Scutt* the younger was appointed to be a trustee of the settlement of 1866, jointly with *Arthur L. Cooper*.

The income of the sum of £2084 11*s.* 9*d.* consols was regularly paid by the trustees of the first settlement to Mrs. *Viant* until her death, which took place on the 25th of May, 1873. Mrs. *Viant* left her surviving three infant children, issue of her second marriage.

On the 7th of August, 1873, administration of the unadministered personal estate of *Arthur J. Hawkins* was granted to *Elizabeth Sophia Hawkins*, the widow and legal personal representative of *William Hawkins*, the father of *Arthur John Hawkins*.

On the 24th of September, 1873, *R. Davis* and *J. Fooks*, the surviving trustees of the settlement of 1857, sold the £2084 11*s.* 9*d.* consols, and the proceeds of such sale, with an apportionment of dividend, realised a sum of £1930 10*s.* 11*d.* cash.

By a deed dated the 17th of December, 1873, *John Viant* assigned to *Richard Nicholas Howard* "all that his right and interest of and in and to the sum of £1042 5*s.* 10*d.*, or other the sum or sums of money to which he was entitled in right of his wife of and in the said moneys derivable under the said policy of assurance on the life of the said *Arthur John Hawkins*, deceased."

On the 8th of January, 1874, *R. Davis* and *J. Fooks* paid the sum

V.-C. B. 1874 *In re* VIANT'S SETTLEMENT TRUSTS.

of £1913 16*s.* cash, being the balance of the £1930 10*s.* 11*d.*, less their costs, to *Elizabeth Sophia Hawkins;* and of such sum there remained in the hands of *Elizabeth S. Hawkins*, after deducting her costs of obtaining letters of administration, the sum of £1839 11*s.* 8*d.*; of which one moiety, less costs, amounting to a sum of £895 11*s.*, was, on or shortly after the 23rd of January, 1874, paid by *Elizabeth S. Hawkins* into Court, and was now represented by a sum of £970 15*s.* 9*d.* consols.

On the 4th of March, 1874, administration to the estate of *Sarah A. Viant* was granted to *John Viant.*

The Petition was presented by *R. N. Howard* and *John Viant*, praying for a sale of the consols, and payment of the residue to the Petitioner *Howard.*

The Respondents to the Petition were *Elizabeth S. Hawkins, Arthur L. Cooper,* and *G. Scutt* the younger.

Mr. *Kay,* Q.C., and Mr. *Cookson,* for the Petitioners:—

The capital of Mrs. *Viant's* moiety of this money was not comprised in the settlement of 1866; only her life interest in the income of the whole.

What purported to be settled by the settlement of 1866, other than the specified property, was, any personal estate to which Mrs. *Hawkins,* or Mr. *Viant* in her right, should "during the coverture become" entitled, "under the provisions of" the settlement of 1857. Mrs. *Hawkins* did not "become entitled" to either the income of the whole or the capital of the moiety "during" the coverture; nor did she become entitled to the capital of the moiety under the provisions of the deed of 1857. She was already entitled to both before the commencement of the coverture; and she became entitled to the capital of the moiety by virtue of the *Statute of Distributions.*

As to Mr. *Viant's* interest in the moiety, it was a reversionary interest, expectant on Mrs. *Viant's* death. It was an interest which could not by possibility fall into possession during the coverture. Thus the case is brought precisely within *In re Pedder's Settlement Trusts* (1). The same principle is supported by

(1) Law Rep. 10 Eq. 585.

the cases there referred to, especially *In re Browne's Will* (1) and *Archer* v. *Kelly* (2), and more recently by *In re Edwards* (3).

In *In re Clinton's Trust* (4) the word "entitled" was held to mean "entitled in possession."

[They also referred to *Otter* v. *Melvill* (5).]

Mr. *Colt*, for the Respondent *George Scutt* the younger, representing the children.

Mr. *Owen*, for the Respondent *Arthur L. Cooper*.

Mr. *Cookson*, in reply, referred to *Blythe* v. *Granville* (6); *Grafftey* v. *Humpage* (7); *Rose* v. *Cornish* (8); and *Alleyne* v. *Hussey* (9).

SIR JAMES BACON, V.C.:—

The only question is as to the legal operation of the settlement of 1866—a question which depends on the language of the covenant.

The words are, no doubt, words of futurity, but they speak from a period of time before the marriage took place. From the moment when the marriage was celebrated in church the covenant came into operation. Whatever took place after the date of the deed was a futurity within the meaning of this settlement.

At the moment before the marriage took place the right of the intended wife was to have a life interest in the particular fund mentioned; and she was entitled, moreover, in the event of there being no children, and in the event of the intended husband dying intestate, and of her surviving him, to the possession of one half of the fund as her own. Upon her marriage that right became the right of the husband, and at the moment the priest's benediction was pronounced on the marriage the husband did "become entitled during the coverture" to that which was hers before.

So that, however the words of futurity may be construed, and

(1) Law Rep. 7 Eq. 231.
(2) 1 Dr. & Sm. 300. 6 Jun 1874
(3) Law Rep. 9 Ch. 97.
(4) Ibid. 13 Eq. 295.
(5) 2 De G. & Sm. 257.
(6) 13 Sim. 190.
(7) 1 Beav. 46; 3 Jur. 622.
(8) 16 L. T. (N.S.) 786.
(9) 22 W. R. 203.

V.-C. B. 1874 *In re* VIANT'S SETTLEMENT TRUSTS.

however much the cases may be considered, I cannot see that the words of futurity here have any material bearing on the question before me.

With respect to the second point that has been argued, namely, the reference in the covenant to the former settlement of 1857, I have no desire to strain the language of the covenant, but I cannot wholly disregard the terms of the settlement of 1857 and what has occurred under it.

Under that settlement the life interest settled on the wife was for her separate use during the joint lives of her husband and herself; and, upon the termination of the estate for the joint lives by the death of the husband, she became entitled under the settlement to an absolute interest in the income of the fund for life, and also, in the events that happened, to one moiety of the capital, subject to her own life interest, absolutely; and I consider that I should be doing some violence to the language of the covenant if I were to hold that it was not "under the provisions of" the settlement of 1857 that she became so entitled.

By the second settlement in 1866 it was provided, that if there should be no children of the second marriage, the property in which an interest during the joint lives was thereby provided for the wife was, in the event of her surviving her husband, to be hers, and she had power to dispose of it by will. This was the sort of provision which, upon the occasion of the second marriage, was contracted for; this was the provision that was made before any covenant began to come into operation. Had no such provision been made, upon the marriage being celebrated, the husband's marital right would at once have prevailed, and he could have done whatever it is open to a husband to do with regard to getting into possession property to which his wife is entitled, subject to her own life interest in it. Then the covenant steps in, and says that that right shall not be the husband's. At least, so I read the covenant, and I think that I do so without doing violence to the words.

In the case of *In re Pedder's Settlement Trusts* (1) the question was a different one in this respect: The property consisted of a vested remainder in land, expectant on the death of a tenant for

(1) Law Rep. 10 Eq. 585.

life who outlived the coverture; and Lord Justice *James* (then Vice-Chancellor) observed (1): "This is not property with regard to which it can be averred that the husband or the wife did become 'seised or possessed of or entitled to' it 'during the coverture.'"

The words of the covenant here are: "If the said *Sarah A. Hawkins*, or the said *John Viant* in her right, shall, at any time or times during the coverture, become entitled to any sum or sums of money and personal estate whatsoever under the provisions of" a certain deed, they should settle the same. In this case, "during the coverture," that is to say, immediately on the marriage being solemnized, the husband did become entitled to a sum of money under the provisions of the deed, and by the settlement he covenanted that whatever he should so become entitled to in his wife's right should be settled.

I am of opinion, therefore, that the argument which has been addressed to me on behalf of the assignee of the husband fails. The attempted assignment was a direct violation by the husband of his covenant.

The claim of the Petitioners must be disallowed; and there must be an order that the fund be paid over to the trustees of the settlement of 1866; but the case is unquestionably one of some nicety, and the authorities suggest doubts upon the question.

My view is that, upon the marriage being solemnized, the husband did become entitled to this reversionary interest, which but for the settlement he might have sold or have done what he liked with; but that the covenant operated on the fund, and brought it within the scope of the settlement.

The costs of all parties will come out of the fund.

Solicitors: Messrs. *Combe & Wainwright;* Messrs. *Pattison, Wigg, & Co.*

(1) Law Rep. 10 Eq. 588.

V.-C. H.

1874

April 29; *May* 1.

HOGG *v.* SCOTT.

[1873 H. 207.]

Copyright—Piracy—Copyright Act (5 & 6 *Vict. c.* 45), *s.* 26—*Limitation of Suits—Conduct of Plaintiff—Acquiescence.*

The 26th section of the *Copyright Act* (5 & 6 Vict. c. 45) does not apply to prevent a suit for an injunction to restrain a piracy of copyright by sale of a book published more than twelve months before bill filed.

Mere delay in taking proceedings after knowledge of a piracy is not in itself such acquiescence as will deprive a Plaintiff of his right to an injunction at the hearing.

ROBERT HOGG, the Plaintiff, was the author and proprietor of a book called the *Fruit Manual*, originally published in 1860, and the third edition on the 4th of May, 1866. It was duly registered under the provisions of the *Copyright Act* (5 & 6 Vict. c. 45). He was also the author and proprietor of the *Gardener's Year Book, Almanack, and Directory*, now called the *Gardener's Year Book and Almanack*. This annual for the year 1871 was published on the 1st of December, 1870; that for the year 1872, on the 1st of December, 1871; and that (under the new title) for 1873, on the 1st of December, 1872. All these annuals were also duly registered under the same Act. He was also the author and proprietor of the copyright of a work entitled *British Pomology—The Apple*, published on the 1st of June, 1851, and that work was also duly registered. *John Scott*, the Defendant, in 1868 wrote and published a work entitled the *Orchardist, or a Cultural and Descriptive Catalogue of Fruit Trees grown for sale by John Scott, Merriott Nurseries, Crewkerne, Somersetshire*. He had in such work copied to a very great extent, frequently *verbatim*, and at other times with slight or merely colourable alterations, from the Plaintiff's *Fruit Manual*, and in particular from the third edition of that book; and he had in his said work also copied to a great extent and in like manner from the Plaintiff's *British Pomology*. *Robert Hogg* was in 1869, and now, one of the editors of the *Journal of Horticulture*. In that year there was a discussion in the gardening journals respecting the *Pommier de Paradis*. Dr. *Masters*, the

editor of the *Gardener's Chronicle*, gave the Plaintiff a specimen of the fruit of the Defendant from that stock, and he was informed by Mr. *Rivers*, a horticulturist, that the Defendant had made an allusion to the editors of the *Journal of Horticulture* in the *Orchardist* in reference to the *Pommier de Paradis*. The Plaintiff wrote to the Defendant for, and on the 6th of October, 1869, received a copy of, the *Orchardist*, and at page 9 of that work he read the remarks in reference to the *Pommier de Paradis*, and to the editors of the *Journal of Horticulture*, but he did not further examine the work. On the 6th of October, 1869, the Plaintiff wrote to the Defendant, thanking him for the copy of the *Orchardist*, and stated that he had only just looked into the *Orchardist*, for he had only got it that morning; that the Defendant's collection appeared to be a very rich one; and that he wished he had an opportunity of paying him a visit. The general character and appearance of the *Orchardist* was that of a catalogue, and every alternate leaf was headed *John Scott's Catalogue*.

The Defendant at the end of 1872 commenced the publication, in parts, of "*Scott's Orchardist, or Catalogue of Fruits cultivated at Merriott, Somerset*, 2nd edition." There were six numbers—one in each month, October and November, two in December, 1872, and one in each month, March and April, 1873—and on their completion he published them in a volume for 7*s.* 6*d.* In this edition the Defendant had republished the piracies from the *Fruit Manual* and *British Pomology*, contained in the first edition of the *Orchardist*, and had copied other parts of the third edition of the *Fruit Manual*, frequently *verbatim*, and at other times with slight or merely colourable alterations, and had also copied in the second edition, in like manner, parts of the *Gardener's Year Books* for 1871, 1872, and 1873. The Plaintiff did not read or see any of the six numbers of the second edition of the *Orchardist*, and it was not until after the publication of the second edition complete that he discovered that the Defendant had extensively copied or pirated from his books. In April, 1873, the Plaintiff's manager informed him that the Defendant had published a work on Fruit Trees, in which he had pirated from the *Fruit Manual*, and he thereupon sent for a copy of the Defendant's book, and, after some delay, obtained it, but previous to its receipt the Plaintiff was not

V.-C. H. 1874 HOGG v. SCOTT.

aware that the Defendant had copied from or pirated his said books. The third edition of the *Fruit Manual* was out of print. The Plaintiff was engaged in preparing a new edition and he, in the *Journal of Horticulture* and the *Gardener's Year Book* for 1873, announced his intention to publish it as soon as ready. The Defendant had also advertised the second edition of the *Orchardist* in the *Gardener's Year Book* for 1873. It was alleged that such publication of the second edition, containing large portions of the *Fruit Manual,* was doing great injury to the Plaintiff by forestalling his proposed new edition of that work, and it was also alleged that the sale of the Plaintiff's other books above referred to had been prejudicially affected by the piracies therefrom contained in the *Orchardist.* On the 5th of June, 1873, *Robert Hogg* filed a bill against the Defendant [1873 H. 139] for an injunction in reference to his printing and selling the *Orchardist,* but it being discovered that the registration under the statute of the *Fruit Manual* was insufficient, inasmuch as the day of first publication had not been stated, and it being considered that that would be a fatal objection to the success of the suit—see *Mathieson* v. *Harrod* (1)—the Plaintiff, on his own petition, obtained the dismissal of his bill with costs. In July, 1873, a correspondence took place between the solicitors of the parties, with a view to terms being come to; but, as the Defendant's solicitors insisted on his right to re-publish such parts of the *Fruit Manual* as he had previously copied in his first edition of the *Orchardist,* on the ground that no suit had been instituted within twelve months next after the offence committed, the terms proposed were rejected, and—the date of first publication having been registered in the meantime—this bill was, on the 2nd of August, 1873, filed for an injunction to restrain the Defendant from printing, publishing, selling, or otherwise disposing of any copy of the *Orchardist* containing any passages copied, taken, or colourably altered, from the *Fruit Manual, British Pomology,* and the *Gardener's Year Book,* for the years mentioned, or any or either of them. The Plaintiff also prayed for damages, accounts, and inquiries, and for costs of the suit.

The Defendant, in his answer, stated that his first edition of the *Orchardist,* although substantially a catalogue of the various trees

(1) Law Rep. 7 Eq. 270.

cultivated by him, contained notes on the management of such trees; that he prepared the work in a great measure from, and as the result of, his own original researches; and that he had recourse to and derived assistance from previous works, viz., *Lindley's Guide to the Orchard*, published in the early part of this century; *McIntosh's Orchard*, published in 1839, and various other works, including the third edition of the *Fruit Manual*, and other works of the Plaintiff. In preparing his first edition, and in introducing descriptions of additional sorts of fruit in his second edition, the Defendant stated that, in describing apples, pears, and other fruits, he placed before him a specimen of each sort of his own growth, or of that which he procured from other sources, and then personally examined and compared the same with the descriptions given by authors, including the Plaintiff, and where he found such descriptions exact and true, and corresponding with his own specimens, he did, to save the useless labour of writing entirely new descriptions, for the mere sake of re-writing, and which might, he considered, have exposed him to the imputation of colourably altering, adopt the descriptions already at his command, but in every instance where he found any discrepancy or other sufficient reason for so doing, he modified and corrected the descriptions, so as to render his book as accurate and true as possible. He also stated that the descriptions in his first edition, taken from the Plaintiff's works, were inconsiderable in comparison with and relatively to the extent of the rest of the first edition, and that many of them were added to and re-modelled pursuant to the plan adopted by him, as above-mentioned. He believed that it would be found, on examination of the *Fruit Manual*, that it was to a large extent composed of information derived and borrowed from the same sources and authorities as those to which he had to some extent had recourse in the preparation of his first edition, and that the Plaintiff had extracted freely from the works of his predecessors, but more especially from those of *Lindley* and *Thompson*. The Defendant further stated that, being under the impression that his first edition had the Plaintiff's entire sanction, and, in the absence of any complaint on the Plaintiff's part of his having made use of the *Fruit Manual*, or his other publications, he had, from the time of publishing his first edition, been engaged, at the cost of considerable time, trouble, and

V.-C. H. 1874 HOGG v. SCOTT.

expense, in preparing a second and an enlarged edition; and that, after the dismissal of the Paintiff's first bill (1873 H. 139), he had not continued to publish the second edition, or sold more than two copies of it; that he had destroyed part, and intended to destroy the whole of the remaining copies; that he intended to bring out a third edition which should not contain anything unfairly copied or colourably altered from the Plaintiff's publications; but with regard to his first edition, he submitted that, inasmuch as it was published so long ago as 1868, and such publication was known to and never complained of by the Plaintiff; that as he was thereby induced to infer that the Plaintiff acquiesced in his publishing the same, and had waived all objection (if he had any) to his so doing; and that as, under that impression, he had been at considerable expense, and had bestowed much labour and care in enlarging and preparing his book for new editions, he was entitled to make such use of any matter therein contained in preparing a new edition as he might be advised. He also stated that he had not sold any copy of the first edition for more than twelve months previous to this bill being filed, and he claimed the benefit of the statute 5 & 6 Vict. c. 45. He believed it to be impossible that the Plaintiff should have been a loser by his (the Defendant's) publications, as he had not sold 300 copies of his second edition, and as the profits had not nearly cleared his expenses of publishing.

Mr. *Fischer*, Q.C., and Mr. *J. C. Wood*, for the Plaintiff:—

The nature of the defence, as set forth in the Defendant's answer, is in effect this: "I will give up what I have taken from your works and inserted in my second edition, but all that which I took and published in my first edition I claim to be entitled to make use of in my third and all my future editions." The piracies, as the evidence shews, have been very numerous both from the *Fruit Manual* and from *British Pomology*.

The first question will be upon the construction of the statute 5 & 6 Vict. c. 45. Sect. 3 prescribes the time that copyright shall endure: the natural life of the author and a further term of seven years from his death; but nothing here will turn on the construction of that section. Sects. 10 and 12 refer to penalties which may be incurred. Sect. 15 provides a remedy for the

piracy of books by special action on the case; and by 21 Jac. 1, c. 16, six years was the period within which to bring such action. Sect. 17 imposes penalties; sect. 23 gives certain rights to owners of copyrights; and sect. 26 enacts, in reference to the limitation of actions, "that all actions, suits, bills, indictments, or informations for any offence that shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect," but such limitation of time was not to extend to actions, &c., in respect of the delivery of books to the *British Museum* and the other four libraries mentioned; and it has been decided that such limitation of time is confined to penalties, and does not apply to suits in equity or to actions at common law, for infringement, but that the full period of six years is allowed within which to commence proceedings. The question has arisen in *Scotland*, but not in this country. In *Stewart* v. *Black* (1), it was held that the right of action had not been lost, though the Plaintiff had not instituted his suit until after a year had expired from the date of publication. That case is clearly in point, and, it is submitted, governs this case. *Clark* v. *Bell* (2), referred to in *Copinger* on the Law of Copyright (3), is also important.

[They were stopped by the Court.]

Mr. *Dickinson*, Q.C., as *amicus curiæ*, referred to the judgment of the Vice-Chancellor in *Attorney-General* v. *Ray* (4) on the construction of the 51st section of the statute 10 Geo. 4, c. 24.

Mr. *Morgan*, Q.C., and Mr. *Sandys*, for the Defendant:—

The word "suit" in the 26th section must mean and be confined to suits in equity.

[The VICE-CHANCELLOR:—The statute applies to every part of the British dominions.]

The words of the section are, "actions, suits, bills, indictments,

(1) Murray, Young, Tennent, & Fraser's Reports, vol. ix. (decisions in the Court of Session), 2nd series, 1846–47, p. 1026.

(2) Morison's Dictionary of Decisions, vol. xix. p. 9.

(3) Page 114.

(4) Law Rep. 9 Ch. 403, n.

V.-C. H. 1874 HOGG v. SCOTT.

or informations for any offence that shall be committed against this Act." Those words include any legal proceedings, and of course a suit in equity, which, it is submitted, must be commenced within twelve months "next after such offence committed." The 15th section of the statute is very important. By that section it is enacted "that if any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of Record in that part of the British dominions in which the offence shall be committed." The word "offence" is there clearly defined, and includes persons other than those who are liable to a penalty. The word "offender" means the person who invades the copyright of another, and such invasion means an offence against the statute.

Mr. *Kerr*, in his book on Injunctions (1), states that, according to the 5 & 6 Vict. c. 45, s. 26, all suits and bills must be commenced within twelve months of the offence. The same words must, it is submitted, have the same meaning in every section of the statute, and the 15th section serves as a gloss upon the 26th section. *Stewart* v. *Black* was decided before the statute, and therefore does not apply.

SIR CHARLES HALL, V.C. :—

I cannot allow the objection taken to the Plaintiff's right to sue because more than twelve months elapsed before he filed a bill in this Court. By the 3rd section of the statute a property is created in an author's work which *primâ facie* is to endure for a term certain, and that property will remain in the

(1) Page 441.

author or his representatives, as owners of it, till it be taken away from him or them. The argument that if a case arises for a suit in respect of the author's right to his property, and the author does not commence his suit within twelve months, that therefore his property is gone, I do not agree with. I do not find that clearly expressed in the statute, and I cannot put such a construction upon the 26th section. The 15th section gives to an owner of copyright a special action on the case in respect of any piracy. The remedy so provided is apparently a cumulative one, but whether it be so or not is not very important. The remedy is given against the person who is called the "offender," and the act spoken of as the "offence" is the printing for sale or exportation of any book in which there shall be subsisting copyright. Mr. *Morgan*, in his argument, contended that the Court ought to put upon the word "offence" in the 26th section the same construction as it bears in the 15th section of the statute. If that were a reasonable construction, it might be adopted, but looking at the other sections in the statute which refer to penalties, I do not think it would be reasonable. There is nothing to be found in them about any "offence" in the sense contended for on the part of the Defendant. If the book which has been improperly published by the Defendant contains property belonging to the Plaintiff, the owner of copyright, I do not see how it can be successfully contended that he is suing in respect of an offence in the sense urged on the part of the Defendant. The Plaintiff is suing in respect of his copyright; that is his property. The 26th section is no doubt not very happily framed; but I am of opinion that, on the true construction of that and the other sections of the statute, the "offence" contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them. The real question is, what is the "offence" intended by the statute? It is the printing for sale or exportation of any work or part of a work by a person who is not the owner of the copyright of that work, and without the consent of the owner. The non-suing by the owner of the copyright in respect of a particular edition or part of an edition of the Defendant's work, is one thing, and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the statute which states that

V.-C. H. 1874 HOGG v. SCOTT.

the person who has already published the edition or part of the edition complained of may go on doing so, and that if he does, the owner has then no remedy for such further "offence." In reference to this question, I may add that the Scotch cases referred to by Mr. *Fischer* are not to be disregarded. They were, no doubt, decisions in reference to books published before the passing of the statute; still they seem to me to be quite consistent with good sense and the reasonable interpretation of the statute. The right of the owner of the copyright to his property in it is not to cease because one copy of the work, which without his sanction contains the piracies, has been sold and disposed of without any complaint on his part. He is not on that account to lose all his property in his copyright; therefore I hold, in accordance with the decisions referred to, and on the construction of the statute, that the Plaintiff has not lost his right to sue.

Mr. *Morgan*, Q.C., and Mr. *Sandys*, on the question of acquiescence:—

The Defendant was induced by the conduct of the Plaintiff to prepare the second and third editions of his book. He has in such preparation incurred considerable expense and labour. After going out of his way to inform the Plaintiff—for he advertised in the Plaintiff's own journal—that he was about to publish his book, the Plaintiff cannot now, after allowing four years to elapse, and making no objection to the first edition, turn round and ask the Court to stop the publication of another edition. The question is not one of laches merely, but it is whether the Plaintiff, by standing by and inducing the Defendant to make such expenditure, is entitled to any relief in this Court. The principle is the same upon motion for an interlocutory injunction as on motion for a decree.

[They referred to *Lewis* v. *Chapman* (1); *Jarrold* v. *Houlston* (2); *Baily* v. *Taylor* (3); *Rundell* v. *Murray* (4); *Saunders* v. *Smith* (5).]

(1) 3 Beav. 133.
(2) 3 K. & J. 708.
(3) 1 Russ. & My. 73.
(4) Jac. 311–314.
(5) 3 My. & Cr. 711.

Mr. *Fischer*, Q.C., and Mr. *J. C. Wood*, for the Plaintiff:—

The question is, whether the Plaintiff, as author, has, under the circumstances of this case, lost his right to the relief which he asks.

[The VICE-CHANCELLOR:—The question is, whether the Court ought to interfere after the Plaintiff wrote that letter of the 6th of October, 1869, as he had knowledge of the contents of the book sent to him.

Mr. *Morgan*:—What editions is it sought to restrain?]

The Plaintiff asks for an injunction to restrain the publication of every edition of the *Orchardist* which contains piracies from the Plaintiff's books. In point of fact the Plaintiff did not, in October, 1869, when he wrote to the Defendant, know of such piracies, and he came to the Court for relief as soon as he heard of and discovered them.

[The VICE-CHANCELLOR:—Suppose I should be of opinion that there has been unnecessary delay?]

But the statute does not say that the Plaintiff shall be deprived of his right because he does not come to the Court quickly. There is here distinct evidence of injury, and therefore the Plaintiff is entitled to an injunction.

[They referred to *Johnson* v. *Wyatt* (1) and *Lewis* v. *Fullarton* (2).]

SIR CHARLES HALL, V.C., on the question of acquiescence, said:—It does not, in the view which I take of this case, appear to me to be necessary to say what is the true conclusion or the legal inference to be drawn in reference to the knowledge of the Plaintiff of the contents of the book, more or less, from the time when he received a copy of it. Assuming that he must be taken as from the time when he received a copy to have been fully aware of the contents, I still think that that circumstance is not sufficient to deprive him of the relief which he seeks in this uit. I have expressed my opinion upon the construction of the Act of Parliament in reference to the question—a

(1) 2 D. J. & S. 18. (2) 2 Beav. 6.

V.-C. H. 1874 HOGG v. SCOTT.

new question, in my view—of the period within which the suit ought to have been commenced. The position of things, assuming that he had knowledge at that time, appears to me to be this: The Plaintiff was at the time he received the copy of the book, which is relied upon as having given him knowledge of its contents, the undoubted legal owner of the copyright, the piracy of which is complained of. That was his property, and he had a right to say to the Defendant, "That is my property, and I will neither allow you to make nor recognise your making use of it." The Plaintiff did not take any step founded on his right to property until he filed his bill. He did file his bill soon after he received a copy of the second edition; but assuming the most in the Defendant's favour, all that had taken place in the meantime, beyond the letter which was sent to him, was the acquisition by the Plaintiff of knowledge that the Defendant was going on publishing the *Orchardist* for two years afterwards, and that the Plaintiff knew in October, 1872, that the Defendant was about to publish a new edition of his book, which was to be much larger and more expensive.

Now up to the time of his knowledge of the new edition, in October, 1872, the Plaintiff was aware only that the Defendant was going on selling copies of the *Orchardist*. When he became aware of the Defendant's intended new edition, there was nothing at all events to induce him to suppose or believe that there would be any new matter introduced into it, taken from the Plaintiff's work. The matter stood, so far as the Plaintiff was concerned, exactly as it did before. I have first of all to consider whether not taking any proceeding with reference to the old matter in any given time would deprive the Plaintiff, on the ground of acquiescence, of the right to come to this Court. The omission to take any proceedings at law or in equity for a time does not in itself appear to me an encouragement to the Defendant amounting to an equitable bar in this Court. It is not enough to shew that the legal right is not to be protected here. It must not be assumed that the Court is satisfied that the Plaintiff by his conduct has led the Defendant to incur material expenses in reference to his new book. Assuming that the Plaintiff has a legal right of action against the Defendant under the

sections referred to, what are the authorities upon which it may be said that his conduct in abstaining from making a claim, and in allowing the Defendant to go on selling his book, has taken that right away? In *Gerrard* v. *O'Reilly* (1), Lord *St. Leonards* said: "It must not be understood that this Court will on light grounds act against the legal rights of parties in cases like the present. There must be fraud or such acquiescence as in the view of this Court would make it a fraud afterwards to insist upon the legal right. The case of *Maher* v. *Foundling Hospital* (2) was a very hard case, and it was strenuously argued at the bar, yet Lord *Eldon* denied the relief generally. This shews that it requires a very strong case to induce this Court to deprive a man of his right at law to prevent a particular act from being done, or his right to receive damages if it be done. No act has been shewn in this case amounting to such acquiescence; on the second ground, therefore, the bill cannot be sustained." I have been referred to what was said by Lord Justice *Turner* in *Johnson* v. *Wyatt* (3). He said: "That there was sufficient acquiescence to justify the Court in refusing to grant the injunction upon an interlocutory application, cannot, I think, be doubted; but I apprehend that to justify the Court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence than is required upon an interlocutory application, for at the hearing of a cause it is the duty of the Court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost."

The same point was dealt with by Lord *Cottenham* in the *Duke of Leeds* v. *Earl of Amherst* (4). His Lordship said (5): "Now acquiescence is not the term which ought to be used. If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. In

(1) 3 D. & War. 414, 433.
(2) 1 V. & B. 188.
(3) 2 D. J. & S. 18, 25.
(4) 2 Ph. 117.
(5) 2 Ph. 123.

V.-C. H. 1874 HOGG v. SCOTT.

that sense, however, there is no acquiescence here, for the act was done when the present Duke was a minor, and when, if he had knowledge or means of knowledge—and he does not appear to have been of age for that—nothing of acquiescence can be imputed to him. The defence, therefore, which is really intended to be set up, is not acquiescence, but release or abandonment of the party's right. For that purpose, however, it is not only necessary to shew that the Plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him against his father, and that having such knowledge, he did some act amounting to a release of that right." Now in this case knowledge by the Plaintiff that the Defendant was advertising his work, which contained the objectionable matter, and that he was going on selling it, does not appear to me to amount to that description of acquiescence in the Defendant's dealing with the subject-matter which must be taken to deprive the Plaintiff of the interference of this Court as from any given time. I am satisfied that his legal right remained, and to have tried the question at law for damages, would, under all the circumstances, have been an unsatisfactory thing to do. Then the question arises, whether the case is altered by the fact that the Plaintiff knew—and I must take it that he knew—that the Defendant was about to issue a new edition of his book. Am I to assume against the Plaintiff that he knew what the contents of the new book would be, whether of the old matter, as in the first edition, or not? or am I to consider that it was incumbent upon him to inquire from the Defendant all the circumstances—whether he was going to put in the new edition what he was at that moment illegally retaining in the old one? Considering the time when the advertisement came out, and the character of that advertisement, and the fact that the Plaintiff was one of the editors of the *Horticultural Journal*, that does not to my mind make it a sufficiently strong case of encouragement or acquiescence on the part of the Plaintiff to justify me in saying that this Court will withhold the relief which he would otherwise be entitled to, leaving him with his undoubted legal right to proceed in a Court of Law in respect of the same matter; that is to say, that the Court having determined the legal question in his favour,

should send him to a Court of Law to get damages, and refuse an injunction. Under such circumstances, to do so would be playing with justice and the forms of procedure. I have, therefore, come to the conclusion that the Plaintiff's right in this Court has not been taken away by what has occurred. Then comes the question of piracy. Mr. *Morgan* pressed upon me, in effect, that the piracy was so great that the Plaintiff must have seen it. I have read through the Defendant's answer on this part of the case, and at present it seems to me that there has been that amount of copying from the Plaintiff's works which brings the Defendant within the authorities —I refer to the cases of *Morris* v. *Wright* (1), *Kelly* v. *Morris* (2), and the cases cited in *Morris* v. *Wright.*

Mr. *Fischer* asked for the costs of the suit.

Mr. *Morgan*:—After what has occurred, it is not a case in which the Plaintiff ought to have costs. As the Defendant has to a great extent made up his book from the same works that the Plaintiff has resorted to, viz., *Lindley's Guide to the Orchard,* and other works of authority, and as the evidence shews that the Plaintiff will not suffer one tittle by the sale of the Defendant's catalogue, and as there has been no unfair or improper use of the Plaintiff's works, there ought to be no costs on either side.

[He referred to *Cary* v. *Kearsley* (3), *Jarrold* v. *Houlston* (4), and *Kelly* v. *Morris.*]

SIR CHARLES HALL, V.C.:—

With regard to the piracy, the Defendant has in his answer set forth the *modus operandi* in preparing his work. It is evident that the Defendant had not in every instance a specimen of the fruit before him; for he says that when he had a specimen he did not omit to compare it with the description, and that he had recourse to and derived assistance from previous horticultural works, including the Plaintiff's third edition of the *Fruit Manual.* In my opinion there is a clear case of copying within the authorities of *Kelly* v. *Morris*—in which the

(1) Law Rep. 5 Ch. 279.
(2) Ibid. 1 Eq. 697.
(3) 4 Esp. 168.
(4) 3 K. & J. 708.

V.-C. H. 1874 HOGG v. SCOTT.

work was of the same character as the Defendant's—and *Morris* v. *Wright* (1). The Defendant has not done that which Vice-Chancellor *Wood* said in *Kelly* v. *Morris* it was essential to do in preparing a work of this description. The true principle in all these cases is, that the Defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been at for the purpose of producing his work—that is, in fact, merely to take away the result of another man's labour, or, in other words, his property. I am of opinion, therefore, that the Plaintiff is entitled to an injunction in the same terms as in *Lewis* v. *Fullarton* (2), and the costs must follow the result.

Solicitors: Messrs. *Webb, Stock, & Burt;* Messrs. *Sandys & Trevenen,* agents for Messrs. *J. & W. B. Sparks, Crewkerne.*

V.-C. H. 1874 *May* 6.

LEIGHTON *v.* LEIGHTON.

[1872 L. 39.]

Ademption and Satisfaction—Double Portions—Evidence of Intention—Rebuttal—Costs.

10 Ch 346
20 Eq 157.

A legacy may be adeemed by a gift, although not made on marriage or any other special occasion with reference to the donee.

By marriage settlement an estate was limited to trustees for a term of years to raise a sum of £12,000 for the portions of younger children of the settlor as he should appoint. Two of the younger children, on their marriages, being paid certain sums, released their shares. The settlor, by his will, in 1866, devised the estate to trustees for a lesser term of years, and subject thereto to his eldest son in strict settlement, the trusts of the term being to raise and pay, within three months of his death, to two other younger children, the Plaintiffs *C.* and *M.*, the sums of £4000 and £6000, the same to be accepted by them in full satisfaction and discharge of their shares of the £12,000. The testator also gave *C.* and *M.* annuities for life, or until marriage, charged upon the same estates, and other annuities charged upon another estate, which he devised to his younger son in satisfaction and discharge of his share of the sum mentioned in the settlement. Between the dates of his will and his death, and also before the date of the will, the

(1) Law Rep. 5 Ch. 279. (2) 2 Beav. 6.

settlor gave to *C.* and *M.* sums of money, and transferred to them certain stocks:—

Held, that the legacies were adeemed *pro tanto* by the gifts of stock made after the date of the will.

Consideration of the evidence necessary to rebut the presumption of ademption.

Costs of Plaintiffs (though unsuccessful) given out of the estate.

BY the settlement of the 8th of February, 1832, made on the marriage of the late Sir *Baldwin Leighton*, Bart., with his late wife, part of the *Loton* estate was limited to trustees, for a term of 1000 years, upon trusts for raising £12,000 for the portions of their children other than an eldest or only son, as Sir *Baldwin* should by deed or will appoint.

Sir *Baldwin* had five children—four daughters and a son—other than his eldest son. Two of the daughters were married, and in consideration of settlements had released their interest in the portion-fund.

Sir *Baldwin*, by his will, dated the 4th of July, 1866, devised his mansion-house of *Loton Park*, and all his estates situate in the counties of *Salop* and *Montgomery*, subject to the term of 1000 years limited by the marriage settlement, and to the sum of £7200 remaining to be raised under the trusts of the same term for the portions of his three younger children named—two daughters of the testator (the Plaintiffs *Charlotte* and *Margaret*) and the younger son—to two trustees for a term of 800 years, and subject thereto to his eldest son *Baldwyn Leighton* for life, with remainders to his eldest and other sons in tail, with remainders over. And the trustees were, out of the rents and profits of the premises, or by mortgage of the same for the said term, or by sale of timber or minerals, or by any other means, within three calendar months after the testator's death, to raise the sums of £4000 and £6000, and pay the same to his two daughters *Charlotte* and *Margaret* (the Plaintiffs) respectively, such sums to be accepted by them in full satisfaction and discharge of their shares of the sum of £7200 above mentioned and all interest, if any, thereon. And they were also, out of the rents and profits of the same premises, to raise and pay to each of them, so long as she should be living and should not be married, the annual sum of £460, to be considered as accruing from day to day, but to be paid by equal half-

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

yearly payments as therein mentioned. The testator gave a rent-charge of £100 to each of the said daughters for life, and so long as each remained unmarried to be charged upon estates in the will mentioned, and subject thereto he gave the same estates to his son *Stanley Leighton* in fee, and declared that the devises and bequests to him were to be accepted by him in full satisfaction and discharge of his share of the sum of £7200.

The testator died on Sunday, the 26th of February, 1871, after a short illness. His late wife had died in March, 1864, and from that time until his death he continued to reside at *Loton Park* with his two unmarried daughters, the Plaintiffs, who assisted him in the management of his household.

On the death of the testator the Defendant, the present Baronet, Sir *Baldwyn Leighton*, entered into possession of the *Loton* and other estates. The Plaintiffs applied to him to pay to them the sums of £4000 and £6000, and the annuities of £460 a year each, and offered, on receipt of the sums of £4000 and £6000, to release the estates comprised in the settlement of 1832 from all claims in respect of the £12,000. Sir *Baldwyn* paid to the Plaintiffs certain sums on account of the annuities of £460 each, but refused to pay to them the sums of £4000 and £6000, or the interest thereof, or to allow the same to be raised under the trusts of the term of 800 years, and he alleged that those sums had been adeemed or satisfied by means of gifts made to the Plaintiffs by the testator in his lifetime; and this suit was instituted for the purpose of having the trusts of the will of the testator carried into execution so far as the same related to the said two legacies and the said two annuities of £460 each.

The testator had for many years prior to his death been in the habit of making gifts to his daughters of sums of stock. On making such gifts he caused the sums of stock to be transferred into their names, and they thenceforth received the dividends as they became due. He always mentioned to them the gifts he was about to make, and the amount of dividends which they would receive, but he never said anything to them to lead them to suppose that he intended such gifts otherwise than as voluntary donations, and in addition to any other provision which he might make for them by his will or otherwise. He gave to another daughter, named, from time

to time four sums of stock and shares which were of the estimated value of about £2000, and they were on her marriage transferred to the trustees of her marriage settlement in addition to a sum of £4000 Turkish Bonds given to her in satisfaction of her interest under the settlement of 1832. In like manner he gave to his daughter *Charlotte* (Plaintiff), at different times between the years 1858 and 1869 inclusive, sums of various stocks of the estimated aggregate value of about £4450 at the time they were given; and to his daughter *Margaret* (Plaintiff), at different times between the years 1865 and 1870 inclusive, sums of various stocks of the estimated aggregate value of about £1350 at the time the stocks were given. These sums of stock were exclusive of the death-bed gifts hereinafter mentioned. So far as the Plaintiffs were aware or could recollect, the testator never made any statement or observation, either to the above referred-to married daughter or to them, as to his object or intention in making these gifts, except on the occasion of his giving a sum of £2000 stock to the Plaintiff *Charlotte* in 1869, when he said that he wished her to have the same income after his death as his eldest son (Sir *Baldwyn*) had at that time—about £1100 or £1200 a year—and she was therefore led to suppose that that gift was intended to assist in making up her future income to that amount. Besides the gifts above mentioned the testator, shortly before his death, gave to the Plaintiffs certain moneys and also sums of stock. On Wednesday, the 22nd of February, 1871, he was, while on a visit to a married daughter residing in *Northamptonshire*, taken suddenly ill, and the illness being considered of a severe character his sons *Stanley Leighton* and Sir *Baldwyn* were telegraphed and written for, as were the Plaintiffs and another daughter. The testator, being aware of the severe nature of his illness, gave, in the presence of several members of his family, certain directions in reference to transfers of consols and stocks, and for the purpose of carrying those directions into effect, he, on Saturday, the 25th of February, executed documents by which he transferred to his daughter *Margaret* (Plaintiff) stocks of the estimated value of about £3438 3*s.* 4*d.*, and to his daughter *Charlotte* deposit notes and a cheque of the value of about £2000; and to his son *Stanley Leighton* Indian railway securities and consols of considerable value. At the

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

time of these transactions and the execution of the documents, in the presence of his sons and daughters, the testator, when asked if he wished to make any alteration in his will, answered "No." Nor did he make any statement or observation as to his objects and intentions in relation to the documents which he executed. The testator died at 8 A.M. on Sunday morning, the 26th of February, 1871, without making any further disposition of his property. The Defendant, Sir *Baldwyn*, contended that such of the sums of stock as were given to the Plaintiffs after the date of the will (4th of July, 1866) ought to be regarded as having been given on account of the sums of £4000 and £6000 directed to be raised under the trusts of the term of 800 years, and that the value thereof ought to be deducted from the amount so raiseable. On the other hand, the Plaintiffs contended that the sums of stock given to them after the date of the will could not be distinguished in principle from those given to them before such date, and that they ought to be regarded as voluntary donations by the testator to them, and intended to be in addition to, and not in substitution for, the provision made by him for them in the will. The stocks transferred by the testator to the Plaintiff *Charlotte* at the date of the will were of the value of about £2450; and those to the Plaintiff *Margaret* of about £350. Subsequently to such date he transferred to *Charlotte* £2000 stock and to *Margaret* £1000 stock, and on his death-bed he gave to *Charlotte* an additional £2000 and to *Margaret* £3100 stock, making up the fortune of *Charlotte* (with the £4000 mentioned in the will) to about £10,450, and of *Margaret* (with the £6000 mentioned in the will) to £10,450. These dispositions were, it was alleged, consistent with an intention to give to the Plaintiffs equal, or nearly equal fortunes, and to increase them from time to time as his means enabled him to do so; and was also consistent with the intention, as expressed to the Plaintiff *Charlotte*, that he wished her to have the same income as her elder brother.

Some six weeks or more subsequently to the death of the testator the Defendant Sir *Baldwyn*, in interviews with members of the family, alleged that the testator on his death-bed, on Thursday, the 23rd, and also on Friday, the 24th, of February, 1871, informed him, speaking into his ear in a very low tone of voice,

that he had paid *Charlotte* and *Margaret* "part of a sum of £8000, and intended paying them off this spring, so, though there is more left by my will, they are only to have that." There was a conflict of evidence in some respects in reference to what took place during the testator's last illness, and at the family conversations subsequently, but the Plaintiffs submitted that, under the circumstances, the words alleged to have been spoken by the testator were not sufficiently certain to be taken as an expression of his intention; and further, that even if he actually used the words attributed to him by Sir *Baldwyn*, there was nothing in them from which an intention to revoke or modify his testamentary dispositions could be reasonably inferred; and that whatever construction might be placed on the words, it would be impossible to make them tally with the theory of Sir *Baldwyn*, that the £8000 excluded the sums given to the Plaintiffs by the will, and included the deposit notes and stocks given to them on Saturday, the 25th of February, 1871.

The Plaintiff *Charlotte* was cross-examined in Court on her affidavit, and in part repeated what she had stated therein, that her father, when he transferred the £2000 in 1869, told her he wished her to have after his death the same income as her elder brother Sir *Baldwyn*. She made no memorandum at the time of the conversation, but her memory was perfectly clear as to the purport of it.

Mr. *Dickinson*, Q.C., and Mr. *Cust*, for the Plaintiffs:—

The question is what was the intention of the testator; and what was passing in his mind when he executed the documents on his death-bed. He did nothing to shew an intention to adeem the bequests made by his will. In every case of this sort the evidence must be clear and precise, as, for instance, it ought to be shewn that the testator said: "Having regard to what I have given by my will, I intend it to be taken as payment of that which I have given by my will;" but there is nothing of that sort in this case.

The rule in regard to ademption is clearly set forth in *Trimmer* v. *Bayne* (1). In that case Lord *Eldon* said: "The rule is settled that where a parent or a person *in loco parentis* gives a legacy as a

(1) 7 Ves. 508, 515.

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this Court will presume he meant to satisfy the one by the other." That decision seems to be put upon a good foundation. The fact of marriage, or an advance to set up in the world, raises a presumption to adeem. Where there is no marriage no presumption is raised. The Court leans against double portions. Where it finds a subsequent gift to the same person by the same donor, the Court will consider that that is a double portion, and a satisfaction of the former, or in other words, an ademption. In *Robinson* v. *Whitley* (1) the gift was by a father to his daughter after her marriage, but the decision was consistent with the principle laid down in *Trimmer* v. *Bayne* (2). In *Debeze* v. *Mann* (3) the gift was not treated as an ademption or satisfaction of a legacy.

The question is, whether the sums given on different occasions after the will to the Plaintiffs—there being no marriage and no setting up in life—are to be considered as anything more than presents from the father to his daughters, and it is submitted that the gifts were made to them in order that they might have an income of a certain amount, say £1100 or £1200 a year. The Defendant Sir *Baldwyn*, even after he has looked through his father's books and lumped certain sums together, does not in his evidence shew the amount necessary to provide that income.

[The VICE-CHANCELLOR:—The sums given by the will are more than the Plaintiffs' shares of the £12,000 mentioned in the settlement of 1832.]

That, no doubt, is so, but in *Baugh* v. *Read* (4) a testator gave a variety of legacies to his children, and the Lord Chancellor (5) said that they could not be treated as double portions.

[The VICE-CHANCELLOR:—In that case the Lord Chancellor was speaking of the law at that time.]

That case is referred to by Mr. *Roper* in his book on Legacies (6), the chapter being "General legacies and their ademption." Now

(1) 9 Ves. 577.
(2) 7 Ves. 508, 515.
(3) 2 Bro. C. C. 165.
(4) 1 Ves. 257.
(5) Ibid. 264, 265.
(6) 4th Ed. vol. i. p. 376.

where there are two substantial gifts made by a man in his proper senses, why should they not both take effect? In *Watson* v. *Watson* (1) both propositions—payments and double portions—are involved. Small payments were not treated as a satisfaction, but a legacy by a person *in loco parentis* was. The answer of Sir *Baldwyn* submits that the sums given after the will are ademptions; but the Plaintiffs contend that they are additional voluntary gifts, and the decision of Vice-Chancellor *Wickens*, in the case of *Taylor* v. *Cartwright* (2), shews that their contention is well founded. No doubt the testator, in bequeathing to his daughter *Charlotte* £4000 and to his daughter *Margaret* £6000, gave much larger sums than he could have given them of the fund mentioned in the settlement; but as it is not even contended that he intended those sums which he gave as presents before the date of his will to go in satisfaction of them, so the same may be said with regard to the sums given after that date. The intention of the testator was to provide a certain amount of income for each daughter, and that income cannot be realized unless it be held that the Plaintiffs are entitled to the sums mentioned in the will; and it is submitted that, upon the facts and the evidence, that is the right view to take.

[They also referred to the cases of *Pym* v. *Lockyer* (3); *Husbands* v. *Husbands* (4); *Spinks* v. *Robins* (5) *Shudal* v. *Jekyll* (6); *Farnham* v. *Phillips* (7); *Roome* v. *Roome* (8); *Holmes* v. *Holmes* (9); *Grave* v. *Earl of Salisbury* (10); *Ex parte Pye* (11); *Bell* v. *Coleman* (12); *Schofield* v. *Heap* (13); *Ravenscroft* v. *Jones* (14).]

Mr. *Fry*, Q.C., Mr. *Marten*, Q.C., and Mr. *Davey*, for the Defendants, Sir *Baldwyn* and his eldest son, were not called upon.

Mr. *Lindley*, Q.C., and Mr. *Phear*, appeared for the Defendant *Stanley Leighton*, but took no part in the argument.

(1) 33 Beav. 574.
(2) Law Rep. 14 Eq. 167.
(3) 5 My. & Cr. 29.
(4) 1 Vern. 95.
(5) 2 Atk. 491.
(6) Ibid. 516.
(7) Ibid. 215.
(8) 3 Atk. 181.
(9) 1 Bro. C. C. 555.
(10) Ibid. 425.
(11) 18 Ves. 140.
(12) 5 Madd. 22.
(13) 27 Beav. 93.
(14) 32 Beav. 669; 4 D. J. & S. 224.

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

SIR CHARLES HALL, V.C.:—

I do not think that the Plaintiffs have made out a case. The matter is one of some difficulty and importance, with regard to the general question, but I mean to decide the case without reference to the special circumstances dependent upon the evidence of the parties one way or the other as to the intention of the testator. I mean to decide the case as one of law without regard to the evidence, for I consider that the evidence bearing on the question which I have to determine cannot be relied upon to vary what I conceive is the legal presumption and the law as applicable to the case independently of the evidence; as to which, though I believe the parties were desirous of speaking the truth, and of giving the impressions which were made on their minds by what took place in the presence of the testator, yet I think they were in error in regard to the details. The question is, I consider, one of law, to be determined upon the acts of the testator in reference to the execution of his will, having regard to the existence of the settlement at the time, and in reference to that which he did between the dates of his will and his death. The facts really lie in a very narrow compass. By the settlement the testator settled the *Loton* estate for the purpose of making a provision of £12,000 for his younger children. The testator was the legal owner of the estate, subject to the portions to be raised. There were five younger children. There was a power to appoint the £12,000 amongst them, and on the marriages of two of his daughters portions of the fund were appointed to them, *i.e.*, the testator exercised his power of appointment by giving them their portions, and freed the estate from them by paying off one portion and transferring a certain amount as an equivalent for or in satisfaction of the other, they executing releases, and thus leaving £7200 as a charge on the estate for the other three younger children, either to be appointed, or in default of appointment for them equally. What the testator did antecedently to the date of his will, in making transfers and provisions to and for his younger children, I cannot consider for the purpose of determining the question in this case. The testator, by his will, provided for his other three younger children—the two Plaintiffs and their younger brother. [His Honour referred to the will as set forth

above.] The trustees of the term of 800 years were to raise the sums of £4000 and £6000, and to pay them to his daughters *Charlotte* and *Margaret* respectively, "such sums to be accepted by them in full satisfaction and discharge of their shares of the aforesaid sum of £7200 raiseable under the trusts of the term of 1000 years." The testator then directed that out of the rents and profits of the same property they should in addition each receive £460 a year during life or until marriage; and he settled an estate upon his younger son, subject to the payment of £100 a year to each of his unmarried sisters during life or until marriage of the Plaintiffs, so that they had under the will £560 each as an annuity for life, or for so long as they should remain unmarried. Having made other provisions for his younger son, he directed that the gifts which he had made in his favour should be "in full satisfaction and discharge of his share of the aforesaid sum of £7200." Now, having made these bequests, the testator, in 1869, transferred certain railway stock to his daughter *Charlotte* (the Plaintiff), and in 1870 he transferred a sum of the same stock to his daughter *Margaret* (the Plaintiff). Those were provisions made in the interval between the dates of his will and his last illness. The next transaction was after he was taken ill.—[His Honour referred to what took place during the last illness of the testator]—and the question to be determined is, whether the sums transferred to his two daughters (the Plaintiffs) after the date of the will are or are not to be taken as being an ademption, as far as they will extend, of the legacies of £4000 and £6000 given by the will? The argument in substance has been that as these sums were not transferred either upon marriage or other occasion calling for an advance by the testator, therefore the law would not hold that the sums so transferred should be taken in reduction of the gifts made by the will. This is the first question, and it is a very simple one. A great many authorities have been cited for the purpose of establishing that it will not do, if you transfer to a child, to whom a legacy has been given, a corresponding amount, or a sum greater or less—if greater, so as to operate as a total extinction, if less, so as to operate as a partial extinction—that it will not do merely to shew that the transfer has taken place or that the payment has been made; but you must shew something

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

beyond that, or that there must be something in the circumstances under which the transfer was made to raise a presumption, which would not otherwise exist in favour of the satisfaction of the one gift by the other. In my opinion, that is not a correct statement of the law. I do not think that, for the purpose of raising the presumption, it is incumbent upon the person who alleges a satisfaction to shew anything more than that the testator, having given a legacy of a certain amount, afterwards in his lifetime gave the legatee a sum of money—the nature of the two gifts not being so different as to rebut the presumption.

In *Trimmer* v. *Bayne* (1) the language used was, "The rule is settled that where a parent or a person *in loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances," &c. The difficulty is how to interpret the words, "or any other occasion calling for it." Who is to determine what is the "occasion"? Ordinarily, it must be the testator himself. He gives as a legacy a certain sum of money as bounty, and he then afterwards says at his own time and viewed according to his own view of things, "This is an occasion on which I consider this child of mine ought to be advanced—he ought to have a sum of money advanced to him;" and he transfers a sum of money or stock into his name. That is ordinarily as simple, as clear, and as unquestionable an advance as anything could possibly be of the child—it may be upon marriage or under any other circumstances. Are you to try the circumstances in each particular case to determine whether the child wanted an advance? The testator says: "I think proper to give a sum of money to my children at this particular time." As to the law and the expression, "any other occasion calling for it," I do not find it in a number of cases in which this question has been considered. The rule is stated much more broadly and generally in many of them; and in reference to the rule Lord *Cottenham*, in *Pym* v. *Lockyer* (2), said: "The *Statute of Distributions*, the customs of *London* and *York*, and the whole doctrine of hotchpot, proceed upon the principle that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to, the object being to produce equality, and

(1) 7 Ves. 508, 515. (2) 5 My. & Cr. 48.

not, according to the rule contended for, inequality between the children. It appears to me, therefore, that all reasoning and all analogy are against the supposed rule." He thought it an analogy to be applied in that particular case—an analogy to be derived from the *Statute of Distributions* and the customs of *London* and *York*, as if that were probably some foundation for the reception of that rule into the English law. But he was referring to that supposing the case of an advance by an intestate to a son. You would not inquire, for the purpose of applying the *Statute of Distributions*, under what circumstances an advance was made, excepting to shew such circumstances as might possibly (if there could be such a case made) negative the application of the statutory law. I do not know whether such a case could be made or not; but if you were not to establish some such special case as that, the mere fact of the child having had the advance would be ground for applying that rule without more—without saying whether it was upon marriage or under any other circumstances. In *Farnham* v. *Phillips* (1) Lord *Hardwicke* said: "Where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, such provision has always been held an ademption," and the rule is stated in much the same way in other authorities. In *Robinson* v. *Whitley* (2), however, the Master of the Rolls said: "I should have doubted whether the rule is that it is necessary to shew what was paid was paid as a portion, or that it is necessary anything should appear except the payment, under circumstances from which it may be inferred that it was paid as a portion." The words "under circumstances," &c., no doubt let in the consideration in every case of any circumstances which would negative the application of the rule, but to say that you must affirmatively shew circumstances for the purpose of applying the rule seems to me to be in no case laid down. Many other cases have been referred to, and no doubt many of them are cases of provisions by way of settlement; but from that fact it does not follow that other cases in which there are not provisions made by settlement on marriage are not within the reason and principle of the rule. I do

(1) 2 Atk. 215, 216. (2) 9 Ves. 577, 579.

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

not think it necessary to go through all the cases which have been referred to. Many of them have in them peculiar features which seem to me to render them inapplicable to this case. I may observe, however, that there is in reference to the "occasion" another difficulty. Does it mean an "occasion" which a father may choose to avail himself of as a desirable opportunity? or is it an "occasion" with reference to the person who is provided for by the will? In reference to that there is the case of *Hartopp* v. *Hartopp* (1). The testator there, by his will, made a provision for a younger child, and he afterwards made a settlement, in which his eldest son joined—the estate being a settled one—the testator being tenant for life, and the eldest son tenant in tail. The testator seems to have stipulated with his son that he should have the advantage of making a charge upon the settled estate, for there was a trust for raising the sum of £2100 for the younger son—the legatee in the will. There was no occasion, therefore, in reference to the son, the legatee, which called for any settlement upon him. The question was, whether that charge was an ademption of the legacy, and it was considered as amounting to the same thing substantially as if the testator had given the £2100 out of his own pocket. It was held to be a clear ademption of the legacy. The Master of the Rolls said (2): "It is settled that in the case of double provisions by a father for a child slight circumstances of difference are not to be regarded, at least where the question is not whether a bounty is meant to satisfy a debt, but whether one bounty is to be substituted in the place of another. That the second provision is in this case a bounty as much as the first cannot be denied, the Plaintiff not having given any consideration for the charge in his favour. But it was not by the act of the father alone, but by the concurrent act of him and the eldest son that the provision was made. . . . The father is thus in effect the sole author of both provisions. By concurring in the settlement, which he was not bound to do, and giving up his life interest in a part of the estate, and subjecting other part to an annuity which might fall upon it in his lifetime, he became a purchaser of the second provision,

(1) 17 Ves. 184. (2) 17 Ves. 191, 192.

which makes the case the same as if it came directly out of his own estate." The presumptive intention was a substitution of the sum thus provided by the father's means for the younger son in the room of the same sum given by the will. The occasion in that case was nothing at all, excepting that the father stipulated for the sum mentioned; the occasion was the making the new settlement, and that occasioned the act being done. But the act being done on that occasion was not inconsistent with the father meaning that the legatee should have both sums. It was, however, said that that was not meant, and that the rule against double portions under such circumstances prevented the son taking the two. Therefore I express my opinion upon the general question, that it is not necessarily incumbent, in order to raise the presumption, to shew more than the mere fact of the transfers or the payments.

That presumption being as I consider raised, both as to those sums which were transferred in 1869 and 1870 to the two daughters, and as to those which were transferred on the occasion of the last illness, the question is, whether the peculiar nature of the provision which had been made by the settlement of 1832 for these three legatees is a circumstance in itself which negatives the presumption. Now *Baugh* v. *Read* (1) is not, as it appears to me, an authority in favour of the Plaintiffs. Mr. *Roper*, in his work on Legacies (2), after stating that case, says: "It is observable in the last case that the advancement by *B.* upon the marriage of his daughter *A.* having been made not merely as a portion, but with a view to the surrender by *A.* and her husband of her interest under her grandfather's will, excluded the presumption that her father *B.* intended also that it should go in satisfaction of the legacy he had given her by his will; which construction was strengthened, if not wholly confirmed, by the consideration that the legacy could not be considered as a pure bounty or portion, since it was given as the purchase of *A.'s* interest under *B.'s* marriage settlement. Such appear to have been the grounds of the determination"—that is to say, that when the second provision was made it was expressly said, stipulated, and bargained that it should be in satisfaction of one

(1) 1 Ves. 257.

(2) 4th Ed. vol. i. pp. 376, 377.

V.-C. H. 1874 LEIGHTON v. LEIGHTON.

thing, while the argument was that it should go in satisfaction of two things. That case was a very special one, and Lord *Thurlow* seems to have considered that but for the special circumstances in it his conclusion would have been the other way, and therefore, it may be considered as an authority against the Plaintiffs rather than for them. That case was commented upon in *Earl of Durham* v. *Wharton* (1). It was said in the argument in the present case that there are circumstances which are properly admissible in evidence, and which lead to a different conclusion, but the evidence is conflicting, and the presumption being raised—and properly so—from the acts of the testator himself, I cannot, without satisfactory evidence, hold that that presumption has been rebutted. I cannot say that either Plaintiff has made out a sufficient case against the legal presumption. It appears to me, therefore, that the true conclusion is that the sums which were so transferred must be taken to have been transferred in satisfaction, or part satisfaction, of the benefits given by the will. It was said that the object of the testator in making these dispositions was to save legacy duty. I think it not improbable that something of that kind was in his mind when doing what he did in contemplation of death. I cannot help thinking that, when you find a testator immediately before his death—when he knows he is about to die—hastily making transfers to some of his children, to whom he had given legacies, the idea of saving duty may have been in his mind. He at all events knows he is doing something which is about to be called, by his death, into immediate operation—his death being the time when the legatees would take the benefits under his will. It looks like anticipating,—giving them now that which they would in the course of a short time get under the will by reason of death. It seems that a person under such circumstances may not improbably be looking, and having regard, in such an act as that, to what the legatees would take under his dispositions. I make that observation the rather having regard to what was done on the occasion of the last illness with reference to the younger son—for the testator was clearly giving to that son the very thing which he would take under the will. The testator was certainly satisfying

(1) 3 Cl. & F. 156.

the bounty and benefit which were conferred on him by the will; and it is not unreasonable to suppose that he was doing the same thing in regard to the Plaintiffs. The whole were transactions of the same character, and with the same motive, object, and purpose. This, I think, comes in aid of the conclusion to which I have arrived quite independently of it.

As to the costs, I view the case in this way: Suppose that, instead of the Plaintiffs having filed a bill, the trustees of the term of 800 years had filed one for the purpose of executing the trusts of that term—they not knowing how much to raise under the circumstances—the costs would unquestionably have been borne in the ordinary way; therefore I think that the proper order will be that the Plaintiffs be paid their costs of the suit, as well as the sum of about £900 which remains to be raised for the Plaintiff *Margaret*. The sums transferred to the Plaintiff *Charlotte* were an entire satisfaction of the legacy given by the will.

Mr. *Lindley*:—I ask that the costs of Mr. *Stanley Leighton* shall be provided for in the same way. He was made a party because of his having a contingent interest in the estate, but has taken no part in the controversy.

SIR CHARLES HALL, V.C.:—Yes, he must also be paid his costs. The trustees of the term of 800 years must raise and pay the necessary sum, together with the costs of all parties to the suit.

Solicitors: Messrs. *Pownall, Son, Cross, & Knott*, agents for Mr. *Richard Marston, Ludlow*; Messrs. *Sharp & Ullithorne*, agents for Mr. *R. D. Newill, Wellington, Salop*.

V.-C. H.
1874
May 6, 7, 25.

15 Ch D 653
21 Ch D 661

MOORE *v.* MOORE.

[1873 M. 131.]

Railway Stock—Deposit Note—Incomplete Gift—Donatio mortis causâ—Declaration of Trust.

A husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, and on which the dividends were received by him, but paid to his wife. He gave the certificates to his wife, and they remained in her possession until he required them in order to replace a lost dividend warrant. While on his death-bed he handed the certificates to his wife, saying, "these are yours," and also gave her a deposit note:—

Held, that the gift of the stock failed as incomplete, and could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust:

Held, also, that railway stock cannot be the subject of *donatio mortis causâ:*

Held, also, on the authority of *Amis* v. *Witt* (1), that the gift of the deposit note was a good *donatio mortis causâ.*

WILLIAM MOORE, the husband of the Plaintiff, who died in January, 1873, previously to the year 1866 was the owner of £100 debenture issued by the *London, Chatham, and Dover Railway Company.* In July, 1866, shortly after the difficulties of the company became notorious, *Moore*, as the bill alleged, gave to Plaintiff this debenture. Under the powers of the *Local Act*, 32 & 33 Vict. c. cxvi., the debenture was surrendered to the company, and in exchange for the same the company issued to *Moore* £64 Arbitration Debenture Stock, £42 Arbitration Preference £4 10*s.* Stock, and £14 ordinary stock, all in the *London, Chatham, and Dover Company.*

When the scrip certificates were received by *Moore* he handed them to the Plaintiff, saying, "these are yours." The scrip certificates remained in her separate custody till July, 1872, and in the interval *William Moore*, on the receipt of any dividend warrant, gave the value to the Plaintiff. The dividend warrant issued in July, 1872, was lost, and the Plaintiff, at *Moore's* request, gave him

(1) 33 Beav. 619.

the scrip certificates in order to enable him to get a second dividend warrant. When the second dividend warrant was received by *Moore* he paid the amount thereof to the Plaintiff, but omitted to give her the scrip certificates, though he frequently promised her to bring them from his warehouse and return them. He always spoke of them, however, as Plaintiff's property. The bill alleged that the testator had given the securities to the Plaintiff, and that under these circumstances the said *William Moore* constituted himself a trustee of the stock for her.

In the early part of December, 1872, *Moore* became seriously ill, and on the 25th of the said month his recovery became hopeless. On that day, in the presence of the Plaintiff and *Charles Moore* and the Defendant's wife, *William Moore* said he wanted a deposit note for £470 10*s.* in the *Derbyshire Bank*, and the scrip certificate of the *London, Chatham, and Dover Railway*, in order to give them to the Plaintiff. Thereupon *Charles Moore* and his wife left the room and went to the warehouse, and sometime afterwards Mrs. *Charles Moore* returned, saying that they could not find the papers. On the 26th of December, 1872, *William Moore* asked Plaintiff whether *Charles Moore* had given her the deposit note and the scrip certificates, and on being answered in the negative he seemed much disturbed, and said, as he had frequently said during his illness, that he had not done the Plaintiff justice, and he told the Plaintiff to call the servant up-stairs, and told the servant to go into his warehouse and ask one of his brothers to send him the deposit note. The servant went, and on her return told *William Moore* that his brothers could not find the papers. He seemed much troubled, and then sent the servant with more particular directions, and she returned with a sealed envelope, which *William Moore* tore open, and, having looked at the contents, gave it to the Plaintiff, saying, "'Misses,' that's for you." On the same day *William Moore* asked if Plaintiff had got her *Chatham and Dover* papers; whereupon *Edward Moore* went into the warehouse and got them, and gave them to *William Moore*, who immediately handed them to the Plaintiff, saying, "These are yours." On the 1st of January, 1873, *William Moore* died, having by his will, dated the 7th of October, 1871, given the whole of his real and personal estate to the Plaintiff for life, remainder in

V.-C. H. 1874 MOORE v. MOORE.

default of issue to his brothers and sister, and appointed the Plaintiff and his brother, *James Moore*, executrix and executor of his will. *James Moore*, the Defendant, having refused to recognise the Plaintiff's claim to the scrip certificates or to the deposit note, the Plaintiff filed this bill to enforce her right.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *Simmonds*, for the Plaintiff:—

The evidence shews that the testator made a complete gift of the railway stock to his wife *inter vivos*. The intention to give was clear, and that intention was carried into effect by delivery in the first instance of the debenture, and after the change in the security of the scrip; but for the loss of the dividend warrant it would have remained continuously in the Plaintiff's possession from the date of the gift. Nothing remained to be done except to substitute the Plaintiff's name for that of the testator, and that perhaps was impossible, as many of these companies refuse to allow securities to stand in the name of a married woman. But even if the delivery were possible, and essential to constitute a complete gift, the husband in this case made himself a trustee for his wife. A husband may do this effectually without a written declaration of trust: *Grant* v. *Grant* (1). That a husband may make a gift to his wife is clear from the case of *Walter* v. *Hodge* (2); though in that case the Court thought the evidence insufficient to establish the gift; whereas here the evidence of the intention to give and of the delivery to the wife is clear. In the recent case of *Morgan* v. *Malleson* (3) the delivery of a memorandum of transfer was held sufficient.

[Mr. *Lindley* referred to *Warriner* v. *Rogers* (4), as shewing that *Morgan* v. *Malleson* is not law.]

The principle laid down in *Morgan* v. *Malleson* is good law, though the report of the case may be meagre. In *Jones* v. *Lock* (5), the Court, though it did not sustain the gift, laid down the principle that a parol declaration of trust may be valid and

(1) 34 Beav. 623. 11 Jur. N.S. 787
(2) 2 Sw. 92.
(3) Law Rep. 10 Eq. 475.
(4) Ibid. 16 Eq. 340, 348.
(5) Law Rep. 1 Ch. 25. 11 Jur. N.S. 913

enforced in equity, and held that the contrary *dictum* in *Scales* v. *Maud* (1) is not law.

[The VICE-CHANCELLOR:—The difficulty in your way is, that the evidence seems to shew that this was intended to be an immediate gift; whether valid or not remains to be seen; but if an intended gift, the authorities would seem to shew that it cannot be held to be a declaration of trust. That was the view taken in the case of *Richards* v. *Delbridge* (2).]

That was not a gift by a husband to his wife, which is a material distinction. But suppose the Court should take a different view, the evidence as to what took place just before the testator's death clearly shews that the gift of the stock scrip and of the deposit note were valid as *donatio mortis causâ*. The evidence shews a clear intention to give on the part of the testator, if the nature of the property did not interfere with his giving effect to that intention. In *Amis* v. *Witt* (3), moneys due on a policy and a deposit note were held a valid gift as *donatio mortis causâ* by delivery. In *Veal* v. *Veal* (4) a promissory note, though unindorsed, and in *Rankin* v. *Weguelin* (5) a bill of exchange payable to donor or order, were held to pass by *donatio mortis causâ*. *Gardner* v. *Parker* (6), *Lawson* v. *Lawson* (7), are to the same effect. A bond is not in principle distinguishable from a cheque, but that a cheque may be made the subject of a *donatio mortis causâ* is settled: *Boutts* v. *Ellis* (8). On these grounds it is submitted that the Plaintiff is entitled.

Mr. *Lindley* Q.C., and Mr. *Cracknall*, for the Defendant:—

The case divides itself into two parts—the case as to the deposit note and that as to the railway scrip. First, as to the case of *Morgan* v. *Malleson* (9), it is clearly overruled by Vice-Chancellor *Bacon* in *Warriner* v. *Rogers* (10), besides being inconsistent with the current of authorities. It is well settled that the Court will not

(1) 6 D. M. & G. 43, 51. 1 Jur N.S. 847
(2) Ante, p. 11.
(3) 33 Beav. 619.
(4) 27 Ibid. 303. 6 Jur N.S. 527
(5) Ibid. 309.
(6) 3 Madd. 184.
(7) 1 P. Wms. 441.
(8) 4 D. M. & G. 249. 18 Jur 585
(9) Law Rep. 10 Eq. 475.
(10) Ibid. 16 Eq. 340–348.

V.-C. H. 1874 MOORE v. MOORE.

aid an incomplete voluntary gift: *Edwards* v. *Jones* (1); *Antrobus* v. *Smith* (2); *Dillon* v. *Coppin* (3); *Milroy* v. *Lord* (4); *Richards* v. *Delbridge* (5). It is not disputed that a valid trust may be declared by parol, but the evidence must go much further than it does here.

[The VICE-CHANCELLOR:—Is there any other case to that effect besides *Grant* v. *Grant*? (6)]

Something of the kind occurred in *Penfold* v. *Mould* (7), but it was not expressly decided. Then as to the evidence, it is quite insufficient here to establish a gift *inter vivos* or *donatio mortis causâ*: *Edwards* v. *Jones*; *Walter* v. *Hodge* (8); *Paterson* v. *Murphy* (9). Lastly, neither a deposit note nor railway scrip can be made the subject of a *donatio mortis causâ*: *Ward* v. *Turner* (10); *Miller* v. *Miller* (11); *Beak* v. *Beak* (12); *Hewitt* v. *Kaye* (13). And if they were, the burden of proof lies on the claimant, and she has failed to discharge it: *Cosnahan* v. *Grice* (14).

Mr. *Palmer*, in reply:—

It is said the evidence of gift is insufficient; but this is a gift from a husband to his wife, and therefore less evidence is required than in other cases. Then as to the authorities cited by the other side, they have no application here. In *Milroy* v. *Lord* it was contrary to the intention that a trust should be declared, and that case is no authority here, where the intention was that the property should pass from the donor to the donee. In *Warriner* v. *Rogers* (15) there was no intention to make an immediate gift at all. What the donor did was to make a kind of nuncupative will, which was of course invalid, and so it was argued.

Then it is said that the railway scrip could not be made the subject of a *donatio mortis causâ*, and *Ward* v. *Turner* is cited

(1) 1 My. & Cr. 226.
(2) 12 Ves. 39.
(3) 4 My. & Cr. 647.
(4) 4 D. F. & J. 264.
(5) Ante, p. 11.
(6) 34 Beav. 623.
(7) Law Rep. 4 Eq. 562.
(8) 2 Sw. 92.
(9) 11 Hare, 88.
(10) 2 Ves. Sen. 431.
(11) 3 P. Wms. 356, 357.
(12) Law Rep. 13 Eq. 489.
(13) Ibid. 6 Eq. 198, 200.
(14) 15 Moo. P. C. 215.
(15) Law Rep. 16 Eq. 340.

in support of the proposition; but in that case all that was given over were the receipts, which gave no title at all, to the property, though they shewed the intention; whereas in this case the scrip are the title-deeds to the property. *Lawson* v. *Lawson* (1) was almost in point in this case. A receipt for a debt due to the moribund, delivered to the donee, was held in *Moore* v. *Darton* (2) to be a good gift. In *Snellgrove* v. *Baily* (3), a man on his death-bed delivered a bond to the donee, saying, "In case I die, this is yours, and then you will have something;" and it was held that it was a good *donatio mortis causâ*. It is submitted in this case that the Plaintiff is entitled.

SIR CHARLES HALL, V.C.:—

The Plaintiff's case is divisible into two parts. First, the Plaintiff claims to be entitled to a sum of £64 *London, Chatham, and Dover* Arbitration Debenture Stock, £42 *London, Chatham, and Dover* Arbitration Preference £4 10*s.* per Cent. Stock, and £14 *London, Chatham, and Dover* Arbitration Ordinary Stock; these three sums being substituted for and representing a debenture of £100 of the *London Chatham, and Dover Railway Company*. Her case in respect of these three sums is founded upon an alleged gift by her husband to her of the £100 debenture. The evidence in support of that gift is her own evidence, in which she deposes to the fact of the debenture having been given to her by her husband; the evidence of a Mr. *Jeffries*, a friend of the husband; and the evidence of *Sarah Taylor*, a domestic servant. The Plaintiff represents that the debenture in question was given to her by her husband; that it was delivered by her to her husband on the occasion of the debenture being changed for the stock in question; that the certificates for the stock were afterwards given up to her by her husband, and were afterwards given up again by her to her husband by reason of the loss of one of the dividend warrants, under circumstances which are stated in her affidavit. The delivery of the debenture and the delivery of the certificates are not deposed to by any one but the claimant, the Plaintiff herself; but the alleged

(1) 1 P. Wms. 441. (2) 4 De G. & Sm. 517.
(3) 3 Atk. 214.

V.-C. H. 1874 MOORE v. MOORE.

gift is supported by the evidence of Mr. *Jeffries*, and by the evidence of the domestic servant, *Sarah Taylor*. The evidence of Mr. *Jeffries* is contained in the third paragraph of his affidavit, which has been more than once read in the course of the argument, and it amounts to this, that he and the testator, the husband of the Plaintiff, had a conversation about *London, Chatham, and Dover* shares, and that the husband stated to Mr. *Jeffries*, as far as the memory of Mr. *Jeffries* serves him, that which is stated in his affidavit. The conversation was in reference to the expediency of Mr. *Jeffries* buying shares in the *London, Chatham, and Dover Railway Company*, and the testator is represented to have said, "I would not, if I were you; I had one £100 share, it will be a long time before ever they pay anything, and I have given it to the misses; it will, perhaps, be worth something some time, and come in for pocket-money." Then Mr. *Jeffries* says, "I am not sure as to the exact words used by the said *William Moore*, but I am sure that he said he had given the share referred to to his wife, the Plaintiff." This was in the year 1867, and the affidavit is made in the year 1874, a period of seven years or thereabouts intervening therefore between the conversation and the time of the filing of the affidavit. It has been observed that the statement of the witness is not strictly applicable to a debenture; but I do not think anything turns upon that; the testator had only this £100 debenture in the *London, Chatham, and Dover Railway Company*, and that was the subject-matter, no doubt, that he was referring to. Then we have the evidence of the servant, *Sarah Taylor*, who, in reference to the same matter, says in paragraph 6 of her affidavit, "I recollect in or about July, 1872, my master handed me a letter which had come by the morning post, saying to me, 'That is the *Chatham and Dover* cheque, give that to the misses, that's the misses's property.' My mistress had not then come downstairs, so I left it on the table." She afterwards says, in paragraph 7, "My master generally handed me the letters containing the dividend cheques, and as he was generally downstairs before my mistress, he would say, 'There is part of misses's fortune.' I frequently heard my mistress say to the master, that he had given the *Chatham and Dover* shares to her, to which he always assented, and sometimes he replied, 'Yes, I know I have.' I recollect my mistress wanting

to sell the shares, and my master advised her to keep them, as he thought they would make more money." It appears that when these dividend cheques were received, the testator used to take them to the warehouse of the firm in which he was a partner, and to pay them into the firm and get cash for them, and no doubt the dividends were paid over to the wife from time to time as he received them. Now the Plaintiff's case as to this is a case of a gift *inter vivos* by the husband to her of the debenture originally, which is now represented by the three sums which I have mentioned; and the question is, whether she has established, so that the Court can act upon it, that the debenture was, and consequently the three sums of stock are, her property. Though the case is one between husband and wife, the *onus probandi* rests upon the Plaintiff to make out a satisfactory case to entitle her to relief in respect of these sums of stock founded on the alleged gift; and the case must be tried and determined exactly in the same way as it would have been tried and determined if a bill had been filed by the next friend of the wife in the lifetime of the husband against the husband. I say tried in the same way, but then we should have had the evidence of the husband, and he would have either admitted it or he would have denied it. He being dead, it must be tried in the same way, except that his evidence on the question cannot be had. Is the Plaintiff on such evidence as I have referred to, she receiving the dividends from time to time, and being allowed to retain them, entitled to a decree? I am of opinion that the evidence is not sufficient for such purpose; it is, in my judgment, too loose and unsatisfactory. It is quite possible that the husband may have meant his wife to have this £100 debenture, to which he attached very little importance, thinking it was worth little or nothing, and being content to let his wife receive the dividends upon it; but to say that upon this evidence the wife could have called upon the husband, or that she could have established her case against the husband's creditors, supposing he had become bankrupt, to have this stock transferred into the name of a trustee for her, seems to me to be saying that which would not be a just view of the case, due regard being had to the obligation resting upon a donee, the person claiming the gift, to establish satisfactorily to the Court the existence of the gift. Therefore I hold

V.-C. H. 1874 MOORE v. MOORE.

that the Plaintiff's case is not made out so far as it depends upon proof of a gift.

If I am wrong in that respect, and if the evidence be considered to be sufficient, there would remain the very important question, whether the gift could be sustained, having regard to the fact of its never having been made a complete gift. It is contended that, under these circumstances, the Court would hold the husband to be a trustee for the wife, and that a trust was established. It would be going, I think, further than any case has gone yet to hold such to be the case with reference to property of this description. It would rather seem to be that the husband, intending to make a gift to the wife, did it in an insufficient manner—it may be from ignorance of the law, he thinking that handing over the certificates to her was sufficient. I am now assuming in the Plaintiff's favour that he handed over to her the debenture, and that the certificates were in her possession for some time. He seems to have considered that this would amount in itself to a gift to the wife; he did not suppose that he was becoming a trustee for the wife; he thought the thing was complete; but his being mistaken is not, in my judgment, a reason why a person who never meant to become a trustee should be made a trustee, and thereby to assume an office which he never supposed he held, and never meant to undertake the responsibilities of. He meant apparently to give her what in his mind was a worthless thing—or at least might or might not be worth something—by handing over to her the certificates, the matter being intended to be complete so far as the gift was concerned, and he having no more to do with it. I think that that is the correct view of the case, although it is a case of husband and wife. Under the circumstances of this case I think that is consistent, and only consistent with the decision and the view taken by the late Lord Justice *Turner*, and also by the late Lord Justice *Knight Bruce*, but more especially by Lord Justice *Turner* in the case of *Milroy* v. *Lord* (1); and I do think it very important to keep a clear and definite distinction between cases of imperfect gift and cases of declaration of trust, and that we should not extend beyond what the authorities have already established, declarations of trust, so as to supplement and supply what, according to decisions of the

(1) 4 D. F. & J. 264.

highest authority, would otherwise be imperfect gifts. I refer to the decisions of Lord *Cottenham* in *Edwards* v. *Jones* (1), and of Sir *William Grant* in *Antrobus* v. *Smith* (2), and other similar cases, where the distinction has always been considered to be very marked and clear; and we shall only be able to satisfactorily dispose of these cases when they arise by keeping this distinction in view.

There seems to have been a notion that you may have a trust declared where the gift is imperfect, although the donor never meant to be a trustee at all—as, for instance, in the case of an imperfect gift to *A. B.* with a trust declared by *A. B.*—that although *A. B.* does not become a trustee, because he has not the thing effectually transferred to him, that you are to turn the gift into a trust and make the donor a trustee. That seems to me not to be consistent with the earlier and high authorities which have been cited in the course of the argument, two of which I have referred to. It therefore appears to me that the Plaintiff has failed to establish this part of her case. Then, supposing the Plaintiff not to succeed on the grounds above considered, it is said that the Plaintiff is entitled, because what took place on the 25th and 26th of December amounted to a *donatio mortis causâ* of these three sums of stock. As regards that, I said in the course of the argument that I should hold that such stock is not the subject of a *donatio mortis causâ* at all, and I found this my judgment upon the case of *Ward* v. *Turner* (3), before Lord *Hardwicke*, which I think applicable to the case, holding, as I do, notwithstanding that modern cases have gone very far beyond the earlier cases as to donations *mortis causâ*, that the law, if it is to be further extended, must be so extended by a higher tribunal. I consider that stock of this description is not substantially distinguishable from *South Sea* Annuities. I also say that in this particular case the Plaintiff has a further difficulty in her way as to these sums of stock, namely, Was the transaction ever intended to be a *donatio mortis causâ* at all? As to that, my impression is that it never was meant to be anything of the kind, but that it was meant to be a completing of the imperfect gift—that it was meant to be, but was not effectuatal as, a clothing of the supposed or believed ownership of the Plaintiff, then existing by reason of the gift of

(1) 1 My. & Cr. 226. (2) 12 Ves. 39. (3) 2 Ves. Sen. 431.

V.-C. H. 1874 MOORE v. MOORE.

the debenture (supposing that to be established), with the possession of the document, which had gone out of and was not then in her possession. What *Sarah Taylor* in her evidence says as to that in paragraph 8 of her first affidavit is this: "Shortly afterwards, or the same day, my mistress came down into the sitting-room, and I heard her say to the said *Edward Moore*, who had come in: 'Oh, *Edward*, I was going to send *Sarah* into the warehouse. Master has been asking if I have got my *London, Chatham, and Dover* papers.' He said, 'I'll go and fetch them.' My mistress returned upstairs, and *Edward Moore* brought in some papers, and handed them to me, and I took them to my master's bedroom, and gave them to my mistress." She there speaks of *my London, Chatham, and Dover Railway* papers, that is to say, she had said she had not got them. Her husband was anxious she should have these documents in her possession, which she had not then, and he was anxious that she should have them as being at that time the owner of them; therefore they were put in her hands as such, and there was no idea whatever of making a new gift or a new transaction, and no idea of any incompleteness of title which wanted perfecting, beyond having possession of the documents in respect of the supposed existing separate ownership of the property itself. Therefore it rather appears to me that, treating the subject-matter as capable of a gift as a *donatio mortis causâ*, the Plaintiff's case fails on that ground. In the case of *Farquharson* v. *Cave* (1), before Vice-Chancellor *Knight Bruce*, an attempt of the same kind was made and failed. I do not at all say there may not be cases of incomplete gifts, where you may make out that the party on his death-bed meant to do that which would operate, if necessary, as a *donatio mortis causâ*. I do not mean to say that you could not have a case of that kind, but the evidence in this case does not satisfy my mind that that was at all what was intended, and I take it that, in order to make out such a case, you must establish that it was the intention of the party that it should operate as a *donatio mortis causâ*, if it did not operate in any other way. Therefore, on all these grounds, I hold that the Plaintiff has failed to make out her case with regard to the three sums of railway debenture stock.

(1) 2 Coll. 356.

The other part of the case relates to the deposit note, and the first question which is raised as to that is whether it can be the subject of a *donatio mortis causâ*. It has been suggested and submitted to me by Mr. *Lindley* that it cannot, and that, although it has been decided to be capable of such a gift, the decision is not warranted by earlier authorities, upon which the particular decision must be taken to have been founded. I have said in the course of the argument—and to that I adhere—that, its having been actually decided by the late Master of the Rolls in *Amis* v. *Witt* (1), I shall not disturb that decision. If that decision is to be disturbed, it must be disturbed by a higher authority than mine. I proceed, therefore, to deal with the case upon the assumption that a deposit note is capable of being made the subject of a *donatio mortis causâ*. Then it is said, supposing that to be so, that it was intended here to be a gift out and out, and that it is in fact a case of imperfect gift *inter vivos*, and not a case of a *donatio mortis causâ*. It is said that, according to the evidence of the lady herself, it was meant to be a gift to her absolutely, and that the testator was disappointed that she had not sent and got the money at once without waiting until his death, which she would have done if the gift was intended to be one conditional upon his not surviving. Upon this part of the case I am with the Plaintiff. I think that having regard to the testator's state of health, although he may have been quite willing that his wife should go and get the money at once from the bankers, that it is not inconsistent with this that the gift itself should be a gift conditional upon his not surviving his then illness. I think that was the real character of the gift, and that if the man had recovered, the deposit note would have had to be returned, or the money, if received, would have had to have been paid over. I think that that is the correct way of viewing the transaction. Then, supposing that to be the transaction, it is said that the gift itself is not sufficiently established to entitle the party to the benefit of it. There is a conflict of evidence. No doubt, as to some part of the statement on behalf of the Plaintiff with regard to what took place when the testator's brother *Charles* and his wife were present, and with regard to what took place afterwards when *James* was present, there is a controversy and a dispute,

(1) 33 Beav. 619.

V.-C. H. 1874 MOORE v. MOORE.

but notwithstanding that, it appears to me that there is sufficient evidence of the actual gift of this deposit note by the testator, that is, by the husband to the wife. The wife deposes to it; she is confirmed expressly by the servant, who speaks very clearly to the fact of its being given by the deceased to his wife, and that is consistent with the fact of the deceased having sent to the warehouse for this note, and handing it over to her instead of letting it remain there, and I cannot accept as a sufficient explanation the suggestion that it was sent for either for safe custody or because the wife was appointed executrix, and the testator, contemplating death, was thinking she might as well have it at once, and that it would come into her possession as executrix. I do not know why he should have selected her to have the custody of it; she was executrix and the Defendant was executor; they were jointly executors. I do not see any reason to doubt the evidence of the servant, *Sarah Taylor*, as to this, and it was a very natural thing that the testator should have desired to give this note out and out to the wife, although he had made her tenant for life of the whole of his property under his will. I believe the evidence of *Sarah Taylor;* and say nothing as to whether or not I credit the evidence of the Defendant and his brother and the wife of the brother. Holding, as I do, upon the authorities, that the deposit note was capable of being made a *donatio mortis causâ*, and considering that it is made out that it was in fact so given, I decide that the Plaintiff has established her title to the deposit note. The declaration must therefore be, that the railway stock forms part of the testator's assets, and that the deposit note is the property of the Plaintiff. The costs must come out of the estate.

Solicitors for the Plaintiff: Messrs. *Bevan & Daniell.*
Solicitor for the Defendant: Mr. *F. C. Greenfield.*

KNIGHT *v.* KNIGHT.

V.-C. H.
1874
June 6.

[1872 K. 66.]

Wife's Equity to a Settlement—Husband defaulting Executor.

Where a testatrix gave her residue among four, and appointed the husband of one of them sole executor, from whom, on the accounts being taken, there was found due a large balance which he was unable to pay :—

Held, that the husband being indebted to the estate, and therefore disentitled to receive anything, no equity to a settlement arose in favour of the wife.

Osborn v. *Morgan* (1) followed.

LUCY JEPHS, by her will, dated the 30th of August, 1870, after giving a few legacies, directed her executor, as soon as conveniently might be after her decease, to convert the residue of her estate, whatever it might be, into cash, and to divide the proceeds equally among her brother and sisters for their own absolute use and benefit.

The testatrix appointed *R. G. Knight* her sole executor, and died on the 27th of September, 1870. *R. G. Knight* proved the will on the 28th of October, 1870, and got in the greater part of the personal estate, and paid the debts and funeral and testamentary expenses of the testatrix. The testatrix had one brother and three sisters living at her death, of whom *Sarah Knight* was the wife of the executor, *R. G. Knight*. On the 3rd of November, 1871, a bill was filed by the brother, *F. J. Jephs*, and two of the sisters of the testatrix, against the executor and his wife, for an administration of the estate. On the 5th of December, 1872, *Sarah Knight*, the wife of the executor, and sister of the testatrix, filed a bill against her husband for an administration of the estate, and on the 14th of December, 1872, obtained the common administration decree, with one or two special inquiries. The suit of *Jephs* v. *Knight* was subsequently stayed, and the conduct of the cause of *Knight* v. *Knight* was given to the Plaintiff in the other suit.

On the 5th of May, 1874, the Chief Clerk made his certificate,

(1) 9 Hare, 432.

V.-C. H. 1874 KNIGHT v. KNIGHT.

whereby he found that the Defendant, *R. G. Knight*, had received assets to the amount of £2529 15*s.* 5*d.*, and was entitled to be allowed £1544 2*s.*, leaving a balance due from him of £985 13*s.* 5*d.* on that account. The Chief Clerk further found that he had paid all the debts, and also the following sums :—

	£	*s.*	*d.*
To *F. J. Jephs*, brother of the testatrix . .	450	6	6
To himself in right of his wife	81	0	0
To testatrix's sister *Maria* and her husband	402	5	0
To testatrix's remaining sister, *Mary Ann*, and her husband	422	6	4

He found also that the assets consisted of the said balance due from the executor of £985 13*s.* 5*d.*, a sum of £667 9*s.* 8*d.* consols, and £11 6*s.* 10*d.* cash standing to the credit of the cause of *Knight* v. *Knight*.

The case now came on upon further consideration, the only question being whether the Plaintiff could enforce her equity to a settlement notwithstanding her husband's default.

Mr. *Waller*, Q.C., and Mr. *Bunting*, for the Plaintiff :—

The wife in this case is entitled to her equity to a settlement, although her husband is indebted to the estate. The real question is, in what way the property came into the Defendant's possession. If it had come to him as husband it might be contended that he had reduced it into possession. It is quite certain here that the whole property came to his hands simply as executor, and therefore was not reduced into possession so as to entitle his representatives to hold it against his wife in case she survived him: *Baker* v. *Hall* (1); *Wall* v. *Tomlinson* (2); and the wife's equity to a settlement therefore still subsists. The fact of the husband being indebted to the estate does not, therefore, intercept the Plaintiff's right.

Mr. *Greene*, Q.C., and Mr. *Jolliffe*, for the Plaintiffs in *Jephs* v. *Knight*, having the conduct of this suit :—

The Court always regards the right of the wife to a settlement as discretionary. In some cases the whole fund is settled,

(1) 12 Ves. 497. (2) 16 Ves. 413.

and in others, as in *Giacometti* v. *Prodgers* (1), nothing is given to the wife. In every case the amount settled depends on the special circumstances of the case. In this particular case it will be most unjust to the other legatees, in order to give it to this Plaintiff, to take any portion of the small fund in Court from them, who will in any case be considerable losers, by reason of the misapplication of so large a part of the assets.

SIR CHARLES HALL, V.C.:—

I am somewhat surprised that no express authority can be found decisive of the question raised in the suit. The case of *Baker* v. *Hall* (2) has been cited, where it was held that if a husband enters into possession of assets in the capacity of executor or trustee, and not in the capacity of husband of a legatee, there is no reduction into possession of the wife's share to prevent it coming to her in the event of her surviving him. In another cited case, of *Wall* v. *Tomlinson* (3), it was held that a transfer of *East India* Stock to the husband of a legatee, merely as a trustee, could not be regarded as such a reduction into possession as that the husband's representatives could hold it against the wife.

But those cases only amount to this, that the Court, when dealing with funds actually existing, considers whether they have been in the husband's hands in his capacity of executor or as husband. In each case the question is one of fact. The husband, being executor, may in the first place receive and hold the property in his character of executor, but afterwards he may retain it in his marital right.

Here the question is this: The executor is the husband of one of the residuary legatees, and is found by the Chief Clerk, on taking the account, to be considerably indebted to the testator's estate. Nothing has as yet come to his wife; then is it competent for her to say to her husband, "You, as between yourself and the other legatees, cannot claim anything in respect of my share, but I, as one of the residuary legatees, claim my share out of the assets that are in Court?" Can the wife say that, when her husband being executor has not discharged his liability to the estate? It

(1) Law Rep. 8 Ch. 338. (2) 12 Ves. 497.
(3) 16 Ves. 413.

V.-C. H. 1874 KNIGHT v. KNIGHT.

seems to me that the other legatees may rightfully insist that no part of the existing assets shall be taken by the husband so long as anything remains due from him, that the wife's equity only attaches to such property as the husband is entitled to receive in his marital right, and that there being no such property, there is no such equity in the wife. In *Osborn* v. *Morgan* (1) it was held that the wife's equity for a settlement does not depend on any right of property in her, but rests on the control which Courts of Equity exercise over property falling under their dominion; and that the right to a settlement is an obligation which the Court fastens, not upon the property, but upon the right to receive it. Where, therefore, a testator gives a share of his property to a married woman and appoints her husband executor, the husband becomes primarily responsible for the whole estate, and the distribution of the assets must proceed on that footing. The Defendant, therefore, so long as he is indebted to the estate, can have no right to receive in right of his wife any part of the assets, and consequently no equity to a settlement of any part of the assets can arise to the wife.

Solicitor for the Plaintiff: Mr. *J. G. Shearman.*
Solicitor for the Defendant: Mr. *T. Alley-Jones.*

V.-C. H. 1874 *June* 11, 12.

TEWART *v.* LAWSON.

Will—Tenant for Life and Remaindermen—Trustees to pay Debts out of Rents—Receiver—Sales of parts of Estates—Tenant for Life entitled to Possession.

16 L.T. 592

Testator, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts and sums of money as he should owe at the time of his decease, whether by way of mortgage, bond, or otherwise, including a sum of £8000 charged upon the estates; and he directed that the rents and profits of the estates should be received by the trustees and be applied in liquidation of the debts until the whole, including the £8000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disincumbered and clear of debts; and that the trustees should invest the

(1) 9 Hare, 432.

moneys which might come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the £8000, by sales of parts of the estates under orders of the Court, and there was an accumulation fund in Court sufficient to pay the £8000. On adjourned summons :—

Held, that the receiver must be discharged, and the tenant for life be let into possession of the estates.

ADJOURNED SUMMONS.

John Tewart, who died on the 19th of April, 1844, by his will, in March, 1842, devised to trustees a moiety of his real estates at *Swinhoe*, after certain trusts not material to be mentioned, to his son for life, with remainder to his grandson (the Plaintiff, *John Edward Tewart*,) for life, with remainder to his (the Plaintiff's) first and other sons in tail, with remainders over. And upon trust to pay, discharge, and satisfy his (the testator's) funeral expenses, and all such debts and sum and sums of money as he should be justly owing or indebted at the time of his decease unto any persons or person whomsoever on mortgage, bond, or otherwise, including a sum of £8000 charged upon his said estates at *Swinhoe* by a certain settlement; and the testator declared that it was his express will and meaning that the rents and profits of his said real estates should from time to time be received by his trustees, and be applied in liquidation of the debts he might owe at the time of his decease, until the whole of the debts of every description then due by him, including the said sum of £8000 so charged upon his said estates at *Swinhoe* by the settlement, should be fully paid off and discharged; and that no person to whom any estate for life or in tail was limited or intended by or in pursuance of the will, should be entitled to the rents and profits of the same estates, or of any part thereof, until such estates were totally disincumbered and clear of debt; and he thereby directed that his trustees should from time to time place out and invest the moneys which might come to their hands by virtue of the trusts of his will in or upon good security at interest, and from time to time call in the money so to be placed out or invested, and to place out or invest the same in or upon new or other securities of the like nature at interest, until the same should be applied by them in any payment to be made under the trusts and directions of his will.

The certificate shewed that the whole of the testator's debts

V.-C. H. 1874 TEWART v. LAWSON.

had been paid, with the exception of the £8000, by sales made from time to time of portions of the real estates, under the orders and directions of the Court; and there was an accumulated fund in Court amply sufficient to pay and satisfy the £8000. A receiver had been appointed; and this was an adjourned summons taken out by the Plaintiff *John Edward Tewart*, the tenant for life under the will, asking that the receiver might be discharged, and that he might be let into possession of the real estates.

Mr. *Joshua Williams*, Q.C., and Mr. *Ferrers*, for the Plaintiff:—

The testator's debts have been paid out of the produce of sales of portions of the real estates, and it is understood that it will be contended that there should be a sum of money set apart to recoup the residue of the estates. But are the directions to apply the rents and profits to the payment of the debts, and the postponement of the possession by the devisee till the debts be all paid, such as amount to a direction to accumulate, which may be in excess of the period of twenty-one years, and therefore void *ab initio?* Trusts for the payment of debts out of rents and profits may be good, and any accumulations of the rents and profits for the same purpose resemble trusts, and will be good within the limits, and void only for the excess. The sales were made under the orders of the Court, there being trusts, however, which authorized such sales. Those sales cannot be disturbed. The estates have been disincumbered, and therefore the receiver ought to be discharged, and the Plaintiff be let into possession. If the direction be not a trust to accumulate, which is void, as tending to create a perpetuity, then it is submitted that the case comes within the 39 & 40 Geo. 3, c. 98, s. 1 (the *Thellusson Act*), and not within the exception in sect. 2. A case falls within that Act where the provisions made by a testator are such that to carry them out there must be an accumulation beyond twenty-one years. It was said that the accumulations were to go on till the estates were recouped. If it had been so, it would have been void. But the direction was till all the debts be paid, and that is something more than one for the mere payment of debts, and so far as it is that, it is for recouping, and therefore void. But, under any circumstances beyond twenty-one years from the death, in 1844, the accumulations ought not, it is submitted, to have gone on.

[They referred to *Wilson* v. *Halliley* (1); *Hawkins* on Wills (2); *Jarman* on Wills (3), and other cases there mentioned; *Lewis* on Perpetuities (4); *Bacon* v. *Proctor* (5); *Bateman* v. *Hotchkin* (6).]

Mr. *Dickinson*, Q.C., and Mr. *Peto*, for parties entitled in remainder:—

The intention of the testator is clear; and it is submitted tha no trust was created under which persons entitled to possession would be kept out of it for a longer time than the law permits. The testator had mortgaged his estates, and had specialty creditors, and the mortgagees had powers of sale, and his debts could have been paid soon after his death. He wished to save the estates for the devisees free from incumbrances, and, knowing that he could not interfere with the powers of the creditors, he directed that no devisee should have possession till the debts of the creditors were paid, and out of the rents and profits, which was in effect a further security for the payment of the debts. Such a trust is, it is submitted, good to the extent of enabling the trustees to receive the rents and profits, and why is it not good to the extent of enabling them to apply the same in payment of the debts? The Court, when it ordered the sales, must have acted on the assumed validity of the trust for accumulation, and it is therefore not void *ab initio*. Nor has it been made invalid since. The Court has acted upon it, and it ought to be carried out now. The direction applies to all the estates, but some portions only have been disposed of. Those portions remaining are, no doubt, clear of debt, but the case ought to be treated as if all portions of the estates had contributed towards the payment, and as they have not, those remaining should now contribute to recoup the estates. Suppose there had been a mortgage of the whole, then they would not have been disincumbered, and the trust must have continued, and the Plaintiff kept out of possession. Apart from the statute 39 & 40 Geo. 3, c. 98, the trust was good at first and now. A trust for creditors after an estate tail is good, for the entail may be destroyed; and a trust for creditors, though apparently void, as being against the rules in reference to perpetuities, is good, for the cre-

(1) 1 Russ. & My. 590.
(2) Pages 120, 122.
(3) 3rd Ed. vol. i. pp. 286, 287.
(4) Page 637.
(5) T. & R. 31.
(6) 10 Beav. 426.

V.-C. H. 1874 TEWART v. LAWSON.

ditors may enforce their demands at any time; and that being so, it is immaterial how or by whose acts they could have been paid. The trust, it is submitted, still remains good, and the devisees in remainder ask the Court to administer it for their benefit, and to dismiss the summons with costs, or that the Plaintiff should not be let into possession without provision being made for recouping the estates out of the rents and profits.

[They referred to *Lord Southampton* v. *Marquis of Hertford* (1); *Bateman* v. *Hotchkin* (2); *Bennett* v. *Wyndham* (3); *Varlo* v. *Faden* (4).]

SIR CHARLES HALL, V.C., after reading the clauses of the will set forth above, continued:—

Upon the construction of the parts of the will which I have read, I think it clear in this case that the testator designed and contemplated that the annual rents and profits should be applied for the purpose of clearing the estate from debt in the way which he has expressed; and that it was not intended by this form of direction to authorize the trustees in any way to resort to the *corpus* for the purpose of paying the debts. On the contrary, the testator clearly, as I think, negatives that, and designs payment of the debts by applying the annual rents and profits, however long it might take.

But though that was the scheme of the testator, that scheme was necessarily subservient to the rights of the creditors to get paid in a different way. The testator does not by his will at all attempt to make any provision for that state of things arising. He leaves that to take its chance, and he creates a trust of the rents and profits to pay the debts, so that they would be paid in that way, and that way only, unless the creditors availed themselves of their legal rights to be paid in a different way, or unless in any way consistent with the law, including the administration of estates in this Court, the debts came to be paid off otherwise than in the way indicated.

If we, therefore, look to the language of the will in the events which have happened the trust has come to an end, and the debts

(1) 2 V. & B. 54.
(2) 10 Beav. 426.
(3) 23 Beav. 521.
(4) 27 Ibid. 255.

have in fact been paid. The rents and profits were only to be applied to pay the debts until the debts were actually paid.

That being the case, I am now asked in reality to create a new trust and a new scheme; to say, what might have been attempted to have been said by the testator, to the effect following: Provided that if any part of my estates shall be sold at the instance of the creditors or otherwise, or if the equity of redemption of any part of my estates shall be foreclosed, then I direct an accumulation of rents to go on until there shall have been got together a fund equal to the value of the property so sold, or the equity of redemption of which has been foreclosed; and such fund shall be dealt with as constituting part of the estate which is to be subject to the limitations of my will." However the testator has not said that; and I cannot take upon myself to say that I must read the will as if the testator had so said, seeing that that certainly would, to say the least, raise a very grave question indeed whether such a provision as that was valid. It was with reference to that that I referred to what the Master of the Rolls said in the case of *Bateman* v. *Hotchkin* (1); it was not the decision itself that I referred to. No doubt the trust is a perfectly good trust, as Mr. *Dickinson* has argued. The cases of *Lord Southampton* v. *Marquis of Hertford* (2) and *Marshall* v. *Holloway* (3), and a variety of other cases of the same kind, establish that. But though the trust is a perfectly valid trust, so far as regards payment of the debts, it is a totally different question whether, when the trust cannot any longer be performed, and is no longer required, this Court is to create another trust to take the place of that which has come to an end—and come to an end in a manner which we must consider the testator cannot have disregarded, cannot have been ignorant of, and which if he could have provided for, we must take it he would have provided for.

Having said so much as I have, and, as I consider, enough for the purpose of determining the question before me upon this will, I also say that if the question had had to be determined even with reference to an express provision such as, it has been suggested, might be created by the Court in the absence of express provision, I should have held that such provision could not be sustained in

(1) 10 Beav. 426. (2) 2 V. & B. 54. (3) 2 Sw. 432.

V.-C. H. 1874 TEWART v. LAWSON

point of law. It seems to me to be directly in the teeth of the principles upon which the accumulation of rents and profits has been held invalid, in reference to the rights of the parties taking under the settlement; that is to say, *Marshall* v. *Holloway* (1), and other cases which, while holding the trust to be perfectly good for the purpose of paying debts, have said, You cannot go beyond that; and that if you are to accumulate beyond the time when all the debts are paid, for the benefit of the persons who will take under the limitations—that is bad; and that notwithstanding that the limitations of the estates themselves are perfectly valid, and valid even with reference to any shifting clause contained in the settlement, and although there may be a succession of minorities during which there would be incapacity to bar the entail. They have said, You are not to create a property in that way. If this were not so, it is obvious that by a scheme of this kind a man might buy an estate for £100,000, and pay only £5000 towards the purchase-money, and provide for accumulation, which might endure through a succession of minorities, and although the creditors might have claimed their money and been paid by sale of part of the estate, the accumulation would go on to create an estate which had no substantial existence when the testator died. But in this particular case I go upon the particular language of this will, and I hold that I am not at liberty to create a trust for the purpose of raising a fund for debts which have already been paid off and discharged — and properly paid off and discharged— although paid off and discharged through the order of this Court.

Therefore the result is that the Plaintiff must be let into possession.

The cause was ordered to be set down on further consideration, and then it was ordered that the receiver should pass his final account and be discharged. The costs of all parties were directed to be paid as between solicitor and client out of the fund in Court, and the residue of it was ordered to be paid to the Plaintiff.

Solicitors: Messrs. *Gray & Mounsey;* Messrs. *Markby, Tarry, & Stewart.*

(1) 2 Sw. 432.

WARNE *v.* ROUTLEDGE.

M. R.
1874
June 12.

[1873 W. 252.]

Copyright—Married Woman—Agreement with Publisher—Implied Contract—Suit to restrain Publication of Second Edition by Licensee.

An authoress, who was a married woman, entered into a verbal agreement with a publisher that he should publish a work at his own expense, and pay her a royalty on the copies sold. The work was accordingly published, but, before all the copies were sold, the authoress arranged with another publisher to bring out a second edition of the same work :—

Held, that no agreement could be implied on the part of the authoress not to bring out another edition until all the first edition was sold, and that a suit against the authoress and her husband and the second publisher to restrain such publication could not be sustained.

Semble, a married woman, entitled to the copyright of a work for her separate use, might enter into such a contract with a publisher for its publication as to bind herself during a definite period not to grant a license to publish the work to any other person, and such a contract would be enforceable against a licensee with notice.

THE Plaintiffs in this case were Messrs. *Warne*, who were publishers, and who claimed under an alleged agreement with an authoress, Mrs. *Cook*, who was a married woman, to have the exclusive right of publishing the first edition of one of her works, and sought to restrain Messrs. *Routledge* from publishing the work until the first edition was sold off.

In April, 1873, Mrs. *Cook* had an interview with the Plaintiffs in reference to the manuscript of a work which she had written, called "*How to Dress on £15 a Year as a Lady*," when it was verbally agreed that the Plaintiffs should publish the said work anonymously, bearing all expenses directly or indirectly connected therewith, and that each copy should be published at 1*s.*, and that the Plaintiffs should pay to Mrs. *Cook*, as the authoress, a royalty of 1*d.* for each copy sold, reckoning for this purpose thirteen copies as twelve.

The Plaintiffs accordingly advertised the book under the title of "*How to Dress on £15 a Year as a Lady, By a Lady*," and, as they alleged, they expended large sums in advertising it. In

M. R. 1874 WARNE v. ROUTLEDGE.

July, 1873, a considerable sale had been obtained for the work, and £100 was paid by the Plaintiffs to Mrs. *Cook* as her royalty on the copies sold.

Differences having arisen between Mrs. *Cook* and the Plaintiffs, in November, 1873, Mrs. *Cook* and her husband agreed with Messrs. *Routledge* that they should publish a revised edition of the book, which they accordingly advertised under the same title, while about 2000 copies of the first edition published by the Plaintiffs remained unsold.

The Plaintiffs then filed their bill against Messrs. *Routledge* and Mrs. *Cook* and her husband as Defendants, praying a declaration that the Defendant Mrs. *Cook* was, under the said agreement with the Plaintiffs, entitled to the copyright of and all beneficial interest in the said book for her separate use, and that, being so entitled, she, by virtue of the same agreement or otherwise, entered into an implied or some other contract with the Plaintiffs that no revised, or altered, or other edition, and no reprint of the original edition of the same book should be published (except through or with the consent of the Plaintiffs) until the Plaintiffs should have sold all the copies of the same book, and that Mrs. *Cook's* separate property in the same book or in the copyright thereof was bound by such implied contract; and also praying that Messrs. *Routledge* might be restrained from advertising, publishing, or selling any revised, or altered, or other edition of the said book until all such copies should have been sold.

Mr. *E. Beaumont* (Mr. *Fry*, Q.C., with him), for the Plaintiffs:—

Under the verbal agreement between the Plaintiffs and Mrs. *Cook*, an exclusive right was conferred upon the Plaintiffs to publish the work during the pleasure of the authoress: *Reade* v. *Bentley* (1). We do not dispute her right to determine the joint adventure at any moment, but we submit that, having determined it, she is not at liberty to allow another publisher to issue a second edition, so long as any copies of the original edition remain unsold on our hands. Our right to sell the remaining stock is not, and

(1) 3 K. & J. 271; 4 K. & J. 656.

could not be, disputed, after the decision in *Howitt* v. *Hall* (1), but we claim not only that right, but also the right to insist that the value of the remaining stock, which we printed in performance of our part of the agreement, shall not be destroyed by the issue of another edition. A right similar to that which we contend for was recognised in *Sweet* v. *Cater* (2) and *Stevens* v. *Benning* (3); we therefore ask the Court to imply a contract on the part of the authoress not to publish another edition until all the copies of our edition shall have been sold, and to enforce that contract against Messrs. *Routledge*, who had notice of our rights.

Mr. *D. Jones*, for Messrs. *Routledge*, and Mr. *Shortt* and Mr. *F. J. D. Bell*, for Mr. and Mrs. *Cook*, were not called on.

SIR G. JESSEL, M.R.:—

This is a bill filed by some publishers against some other publishers and Mrs. *Cook* and her husband, and it in effect seeks to restrain the lady from publishing or allowing others to publish a work the copyright in which is undoubtedly vested in her. Now, if there is anything to prevent her exercising her rights, it must be found either in the bill or in the evidence, and I cannot find it anywhere. There is not, as far as I can see, a pretence for saying that she ever contracted not to publish the book, which is what I am asked to prevent her from doing.

This is a bill for an injunction in respect of a contract as to which there can be no specific performance. Whatever the contract may be, it is not contended that it is one which this Court will specifically perform. Therefore, it comes amongst that class of cases of which *Lumley* v. *Wagner* (4) is a remarkable example, in which the Court will restrain a person from doing an act, although it cannot compel the person so restrained to specifically perform the contract, whatever it be. That hardly applies here in the same manner, because the person sought to be restrained is not, nor are those claiming under title from her, required to do anything more, and therefore many of the objections which have

(1) 10 W. R. 381.
(2) 11 Sim. 572.
(3) 1 K. & J. 168.
(4) 1 D. M. & G. 604.

M. R. 1874 WARNE v. ROUTLEDGE.

been raised as to the interference by the Court in that class of cases do not apply here; but still it must not be forgotten, as was said by Lord *St. Leonards* in *Lumley* v. *Wagner* (1), that it is not a jurisdiction to be extended.

The jurisdiction, if founded at all, must be founded upon contract, and upon clear contract, because the Court will not interfere by injunction, unless a clear contract is shewn. Therefore, it is incumbent on the Plaintiffs to shew a clear contract by some one not to publish this new edition of the work in question. Here, however, the contract, or whatever it was, was entered into with a married woman, who was entitled to this copyright for her separate use; and, as I understand the mere power of contracting which a married woman has in respect of such property, is not a power of entering into a personal contract in the sense of binding her personally, but a power of contracting so as to bind her property; in other words, you can enforce that contract as against the persons who, for the time being, hold that property, so far as it is a contract affecting the property. Therefore I take it that it is not impossible that a married woman may so deal with copyright to which she is entitled for her separate use as to prevent the assigns of that copyright from breaking her contract. In other words, I think it is quite possible that a married woman may put a kind of fetter upon the right to publish, that is, that she may so far validly bind the copyright, which is a right to publish, that no person claiming under her by way of assignment or license with notice would be allowed to publish.

To illustrate what I mean, take a simple instance. Suppose a married woman having a copyright settled to her separate use, agreed to give an exclusive right to the publisher to publish an edition of 10,000 copies of a book, and at the same time agreed that in consideration of his agreeing to publish it at a given price per copy, and to pay her a sum of money, she would not grant a license to any other person for a definite period to publish that book, and would not allow it to be published either by herself or anybody else—that sort of contract would, I think, be enforceable against any one who took either an assignment or sale of the copy-

(1) 1 D. M. & G. 604.

right with notice. If it were otherwise, instead of a married woman having the power of dealing with her property in the same way as a man, she would not have the power of entering into the same beneficial arrangement as a man can enter into.

But the real question that I have to decide comes long before we reach that point. The question is, what is the contract? [His Honour then stated the facts of the case.]

It is not denied that the conversation between Mrs. *Cook* and Mr. *Warne* did not create a contract for any definite period. The Plaintiffs' counsel argued that it was a contract revocable by either party at pleasure, or a kind of joint adventure determinable at will. What was it for? The publishers were to publish this book, and were to pay a royalty of 1*d.* for every copy they sold. A very simple contract. What did it imply? Is it an exclusive license? It is agreed that it is not an assignment of the copyright. I think it might be considered a license, although that is by no means an easy thing to decide. Neither party said a word about its being a license, and of course nothing is better settled in a claim of copyright than that a license of this kind would not be an assignment of the copyright. But then, looking at the nature of the book, and to the circumstance that it was a term of the agreement that the publishers should publish at their own risk and pay the royalty, I think the contract, so long as it existed, must be taken to be an exclusive contract, that is to say, that so long as Messrs. *Warne & Co.* were allowed to publish, so long no one else could publish, neither the lady herself, or an assign from her.

That being established, what is the next right it gives to either party? On the determination of the partnership adventure, or whatever you choose to call it, what right had Messrs. *Warne & Co.* in the book? There is authority upon the subject, but I do not think it wants authority. I think it is plain that no termination of the agreement could deprive them of the right of selling the copies which they have themselves printed under this arrangement. Whether the arrangement was at will or for a term, the publishers must retain the right of selling for their own benefit (subject to the royalty) the copies which they have printed at their

M. R. 1874 WARNE v. ROUTLEDGE.

own expense in reliance upon that agreement. So far I go with the Plaintiffs, but the Plaintiffs then want me to import something else, not only that the publishers should have a right to sell any copies they might have printed before the disagreement, but that the owner of the copyright should not have the right to publish at all so long as any copies remain unsold. I cannot find that in the agreement, and it does not seem to be reasonable to import it; because it would come to this, that if the publishers printed a very large number of copies it would deprive the authoress of the copyright altogether. I cannot import such an unreasonable term into the agreement.

Then it is said, that if you give the publisher no protection the result may be that the author may publish another edition a day or two after the publishing of the first edition, and so destroy the value of the remaining copies of the first edition remaining unsold. That may be. And it is said that that is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt partnerships at will have their inconveniences as well as their conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up because it might be convenient to one of the parties after the termination of the arrangement. If you do want that protection for a term of years, or for a definite term, you must contract for it. That is all. But I cannot import such a term into the contract. If I did I should make partnerships at will involve consequences that the partners never dreamt of.

Suppose two people took a shop together in *London*, one finding the capital and the other the skill and power of management, and suppose the one finding the capital took a lease of the shop, and expended a large sum of money in furniture, fixtures, stock-in-trade, and goods, and suppose, a week afterwards, the other one determined the partnership. No doubt that might occasion a very great loss to the capitalist, but could I import an agreement that the other man should not carry on any business elsewhere until sufficient time had been given to enable the first man to get remuneration for the expenditure in buying stock, and leasing the shop, and so forth, for that is what I am asked to do in this case?

The answer is, no; if you wanted to engage the services of a skilled man for a term of years, you should have made your partnership for a term of years, and then you could not have got rid of him at your will and pleasure, but you have got the advantage of determining the arrangement at your will and pleasure, and you object to his determining it when he likes. In fact, I am asked to make an agreement for the parties, and an agreement which I am satisfied was never contemplated on the part of the lady, and I very much doubt whether it was ever contemplated by the publishers. I believe the publishers relied, not upon any legal bargain at all, but upon this: they had great experience with authors, and they had found that, as a rule, when arrangements of this kind were made, they were not broken without sufficient reason; and I cannot help seeing that, in this case, if something had not occurred, which it is not for me to say was or was not a sufficient reason, but which the lady thought a sufficient reason, this bargain or arrangement would have gone on, and would not have been terminated, and that, in my opinion, is what the publishers relied on, and that is what the lady relied on. This bargain has been put an end to, and I cannot make a new bargain for the parties; and I say it is not only not necessary to infer any such term as the Plaintiffs insist upon, but I think the introduction of such a term would be irrational; and as there is no such term in the contract, and I decline to infer one, the result is that there is no breach of contract of which the Plaintiffs can complain, and consequently this bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Beaumont & Son.*

Solicitors for the Defendants: Mr. *A. R. Hordern;* Messrs. *Allen & Son.*

Not applied. *Re* DAVIDSON (*decd.*). [1949] 2 All E.R. 551.

M. R.
1874
June 24.

WELLS *v.* WELLS.

[1873 W. 75.]

Will—Words "My Nephews and Nieces"—Niece by Affinity.

17 L.D. 384.

Testatrix, after giving a specific bequest to *A. B.*, who was her husband's niece, but whom she there described as "my niece, *A. B.*," afterwards gave the residue of her property thus: "unto all my nephews and nieces":—

Held, that the nephews and nieces by blood of the testatrix were entitled to the residue, to the exclusion of *A. B.*

Grant v. *Grant* (1) disapproved.

CATHERINE WELLS, by her will, gave various specific bequests to her nephews and nieces therein named, and among them was the following bequest:—"I give to my niece *Ann Burman* my large dinner dish and basin;" and she gave the residue of her personal estate and effects as follows:—"unto all my nephews and nieces who shall be living at the time of my decease, to be equally divided between them."

The testatrix left eleven nephews and nieces her surviving, and there were at the date of her will and at the time of her death nine nephews and nieces of her husband, one of whom was the said *Ann Burman*.

The question arose, on further consideration of a suit for the administration of the estate, whether *Ann Burman* was entitled to a share in the residuary gift as one of the "nieces" of the testatrix.

Mr. *Speed*, for the executors.

Mr. *H. A. Giffard*, for *Ann Burman*:—

The testatrix in this case has put her own construction upon the words "nephews and nieces," for among a number of specific gifts to her nephews and nieces in the earlier part of the will she has given one to her husband's niece, *Ann Burman*, who is there described as "my niece," and who, therefore, cannot be excluded from the residuary gift "to all my nephews and nieces." The

(1) Law Rep. 5 C. P. 380, 727.

question of a gift to nephews or nieces by affinity was considered in *Smith* v. *Lidiard* (1) and in *James* v. *Smith* (2).

In *Grant* v. *Grant* (3), where there was a gift to "my nephew *Joseph Grant*," and the testator had a nephew of his own named *Joseph Grant*, and his wife had also a nephew of the same name, it was held by the Exchequer Chamber, affirming a decision of the Court of Common Pleas, that extrinsic evidence might be admitted to shew that the wife's nephew was the one intended. There was a similar decision of the Court of Probate in reference to the same will (4). That case is a direct authority in favour of the present contention, and cannot be set aside in consequence of the *dicta* in the judgments of the Court of Appeal in *In re Blower's Trusts* (5) and in *Sherratt* v. *Mountford* (6), where nephews and nieces by affinity are said to be nephews and nieces in a secondary sense.

Here the testatrix has clearly shewn that she considered *Ann Burman* as her niece, for she has so described her. She must, therefore, be taken to be one of the objects of the residuary gift.

Mr. *Henderson*, for the nephews and nieces of the testatrix who claimed to be entitled to the exclusion of *Ann Burman*, was not called on.

SIR G. JESSEL, M.R.:—

I think Mr. *Giffard* has argued this case exceedingly well.

Where a word has a primary signification those who allege that the testator used it in another signification cannot shew it by parol evidence extrinsic to the will. Here there is a gift in these terms, "Unto all my nephews and nieces." Have these words a primary signification? The Court of Appeal has so decided in two cases. In the case of *In re Blower's Trusts* (7) Lord Justice *Mellish* observed: "It is clear that the words 'nephews and nieces' *primâ facie* mean the children of brothers and sisters;" and in *Sherratt* v. *Mountford* (8) the same learned Judge observed:

(1) 3 K. & J. 252.
(2) 14 Sim. 214.
(3) Law Rep. 5 C. P. 380, 727.
(4) Ibid. 1 P. & D. ~~654.~~ 8
(5) Law Rep. 6 Ch. 351.
(6) Ibid. 8 Ch. 928.
(7) Ibid. 6 Ch. 355.
(8) Ibid. 8 Ch. 928, 931.

M. R. 1874 WELLS v. WELLS.

"There is no doubt a man's own nephews and nieces are primarily his nephews and nieces, but I am of opinion that his wife's nephews and nieces are his nephews and nieces according to the ordinary meaning of the words in a secondary sense."

If that is so, the words "my nephews and nieces" must, according to these decisions, mean nephews and nieces in the primary sense, unless there is something in the context to give the words a different meaning.

Then it is said that, as in the former part of the will, *Ann Burman* is described by the testatrix as "my niece"—she being a niece of the husband of the testatrix, and only a niece by affinity, and the word being used in its secondary meaning—the words "nephews and nieces" must be taken to have that secondary meaning in the residuary gift. But I am of opinion that you cannot import the secondary meaning of the word into the residuary gift merely because it has been used in the former part of the will, and in this I agree with the view taken by Vice-Chancellor *Wood* in *Smith* v. *Lidiard* (1).

The only difficulty in the case arises from the decision of the Exchequer Chamber in *Grant* v. *Grant* (2). But that case only decided that the primary meaning of the word "nephew" included not only the child of the testator's own brother, but also the child of his wife's brother. That is a question not of law but of the English dictionary, and according to my view of the English language, the ordinary meaning of the words "nephews and nieces" is a man's own nephews and nieces, that is by consanguinity and not affinity, and therefore I am of opinion (as I must decide between the judgments of the two Courts) that the decision of the Court of Appeal in Chancery is to be preferred.

That being my view, as it was the view of Vice-Chancellor *Wood* in *Smith* v. *Lidiard*, I hold that the nephews and nieces of the testatrix by blood are the only persons entitled to take.

Solicitors: Messrs. *Taylor, Hoare, Taylor, & Cooke*, agents for Mr. *B. C. Heath, Warwick.*

(1) 3 K. & J. 252. (2) Law Rep. 5 C. P. 727.

In re ESSEX BREWERY COMPANY.

BARNETT'S CASE.

M. R.
1874
July 11.

Company—Allotment of Shares—Ultrà Vires Contract—Rescinding.

A company was formed in 1871 with a capital divided into shares of £5 each. The capital not having been all taken up, the directors passed a resolution that each of the existing shareholders should have the option of taking the unissued shares at £1 each in proportion to his holding. Allotments were made of shares in pursuance of this resolution to various persons, including *B.*, one of the directors. Afterwards it was discovered that the transaction was *ultrà vires*, and the directors passed a resolution rescinding their previous resolution and the allotments, and *B.*'s name was never placed on the register of shareholders in respect of them. The company having been wound up compulsorily:—

Held, that the rescission was valid, and that *B.* was not a contributory in respect of the shares so allotted to him.

THE *Essex Brewery Company* was registered in March, 1871, as a company with limited liability, having a capital of £30,000 divided into 6000 shares of £5 each.

Part only of the capital was subscribed for previously to September, 1872, and at a meeting of the board of directors held on the 19th of that month, it was resolved that each shareholder should have the option of taking the remaining shares at £1 each share *pro ratâ* to his holding; and in case of any shareholder declining to take them, the shares then remaining to be offered to the other shareholders at the same price.

Edward Barnett, who was one of the directors and had been present at the meeting of the 19th of September, applied verbally for 1000 shares on the terms of this resolution; and at a board meeting held on the 26th of September (at which *Barnett* was not present) it was resolved that 1000 shares be allotted to him. At the next board meeting, held on the 3rd of October (at which *Barnett* was present), it was resolved as follows: "That half the amount due on the shares allotted last meeting be paid up in seven days;" and it appeared from the minutes that *Barnett* there and then paid £500 on account of 1000 shares allotted to him.

The directors passed the aforesaid resolutions in the belief

M. R. 1874 BARNETT'S CASE.

that they had power to issue the shares as fully paid up at the price of £1 each; but soon after the 3rd of October, 1872, the auditor of the company raised a question as to the legality of the transaction, and both the board and Mr. *Barnett* were advised by their respective solicitors that the transaction was *ultrà vires*.

On the 29th of November, 1872, the directors passed the following resolution: "That inasmuch as the directors are advised that they have no power to issue fully paid-up shares on payment of any less sum than the nominal amount of such shares, the resolutions passed at the several board meetings held on the 19th and 26th of September be rescinded, and all applications for shares on the terms of the resolutions be cancelled, and all sums received on such applications be returned forthwith, or as soon as the funds of the company may permit; and until payment, the sums so paid be carried over to the separate accounts of the persons having paid the amounts."

In pursuance of this resolution Mr. *Barnett* was credited with £500 in the books of the company. His name was never placed on the register of shareholders in respect of these shares.

The company having been ordered to be wound up, the official liquidator took out a summons, seeking to place him on the list of contributories in respect of these 1000 shares. This summons was supported by a creditor who had leave to attend the proceedings, and was adjourned into Court and now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *W. F. Robinson*, for the official liquidator.

Mr. *Byrne*, for a creditor having leave to attend:—

These shares have been completely and effectually allotted; and the fact that *Barnett's* name was never entered in the register was immaterial. Consequently the shares must be paid for in cash, as provided by the *Companies Act*, 1867, s. 25. The arrangement as to the shares being treated as fully paid up is not binding on the company; but the directors cannot take advantage of that. A contract, if adopted by the company, is binding on a director, though it may be *ultrà vires*: *Robinson's Executors'*

Case (1); *Ex parte Stanhope* (2); *Woollaston's Case* (3). The directors could not, by rescinding the contract, get a benefit for one of themselves.

Mr *Graham Hastings*, for another creditor.

Mr. *Marten*, Q.C., and Mr. *Bardswell*, for Mr. *Barnett*, were not called upon.

SIR G. JESSEL, M.R.:—

This case appears to me to be very clear.

The directors of a company pass a resolution to allot shares as having £5 paid up on a payment of £1. An allotment is made accordingly, and 10*s.* in the pound is paid. Then, before registration, they get advice and are told that their resolution is *ultrà vires*, as in fact it was. They then pass another resolution rescinding the former one, and they say to the allottee, "As it is not convenient for us to return the money you have paid, we shall credit you with it, and treat it as a loan to the company." Both sides, in fact, repudiated the contract; and I am of opinion they were entitled to do so. There is no authority which says that where an invalid allotment to a director has not been completed by registration, it cannot be rescinded. Mr. *Barnett* cannot be settled on the list in respect of those 1000 shares; and the application must be refused with costs.

Solicitors: Messrs. *Hollams, Son, & Coward;* Messrs. *Morley & Shirreff;* Messrs. *Reep, Lane, & Co.*

(1) 2 D. M. & G. 517. (2) 19 L. J. (Ch.) 389.
(3) 4 De G. & J. 437.

M. R.
1874
July 3, 16.

BELLAIRS *v.* BELLAIRS.

[1873 B. 118.]

Legacy—Condition in Restraint of Marriage—Fund arising from Proceeds of Sale of Realty—Mixed Fund.

A condition subsequent in restraint of marriage is void if annexed to a gift of the income arising from a mixed fund consisting of the proceeds of sale of real estate and pure personal estate :—

Semble, such a condition is also void if the gift be of income of a fund arising from the proceeds of sale of realty only.

THE Rev. *Henry Bellairs*, by his will, dated the 14th of June, 1861, gave his residuary real and personal estate to trustees upon trust to sell his real estate, and to sell, call in, and convert into money such part of his personal estate as should not consist of ready money; and to invest the proceeds of such sale, calling in, and conversion, and of his ready money, as therein mentioned, and to divide the income of such investments into forty equal parts, and pay the same between his seven children in the shares following: that is to say, to his daughter *Laura Parker Bellairs* ten shares thereof; to his daughter *Nona Maria Stevenson Bellairs* ten shares thereof; to his daughter *Frances Lake Brown* four shares thereof; to his daughter *Agnes Hulbert* four shares thereof; to his son *William Oswald Mackenzie Bellairs* three shares thereof; to his son *Arthur Heathcote Bellairs* six shares thereof; and to his son *George Byng Bellairs* three shares thereof; and after the decease of any one or more of the said seven children, to hold the said investments upon the trusts therein mentioned.

The testator made a first codicil to his will, the provisions of which are immaterial to be mentioned. He also made a second codicil, dated the 3rd of November, 1871, which, after reciting that by his will he had directed the income of his residuary estate to be divided into certain shares, and had given to his daughter *Laura Parker Bellairs* ten of such shares and to his daughter *Nona Maria Stevenson Bellairs* ten shares, proceeded as follows :—

"Now I do hereby declare that on the marriage of either of my

said daughters the bequests of the said shares so given to them and each of them as aforesaid shall absolutely cease and be void; and in lieu and substitution thereof I give and bequeath to such one of them as shall have so married, four shares only of my said residuary estate. . . . And I give and bequeath to such one of my said daughters, so long as she shall remain unmarried, thirteen of the said shares in my said residuary estate. But I direct that the same be reduced to four shares only on her marriage. . . . And I hereby direct that on one of my said daughters being married, the three overplus shares, and in case of both of my said daughters marrying, the twelve overplus shares, shall fall into and form part of my said residuary estate, and be divided as in my said will is mentioned."

The testator died on the 17th of April, 1872, being at the time of his death entitled to a large amount of real estate, and also to considerable personalty.

Subsequently to the testator's death his daughter *Laura Parker Bellairs* intermarried with *John Price*.

This suit was instituted for the administration of the testator's estate, and now came on to be heard on further consideration. The main question was whether Mrs. *Price* had forfeited her share of the income of the testator's residuary estate, which had been converted and invested in accordance with the provisions of the testator's will.

Mr. *Marten*, Q.C., Mr. *Bagshawe*, Q.C., Mr. *Chitty*, Q.C., Mr. *B. B. Rogers*, Mr. *Kekewich*, and Mr. *Dyne*, for various parties interested in the estate:—

We submit that the directions in the second codicil are valid and effectual, at all events in so far as the trust fund represents the proceeds of real estate.

We say, first of all, that on the true construction of the will this is a gift of ten shares of the income to *Laura Parker Bellairs* until her marriage, and from and after her marriage, of four shares only; and such a gift is perfectly valid: *Rochford* v. *Hackman* (1); *Evans* v. *Rosser* (2); *Heath* v. *Lewis* (3); *Webb* v. *Grace* (4). But

(1) 9 Hare, 475.
(2) 2 H. & M. 190.
(3) 3 D. M. & G. 954.
(4) 2 Ph. 701.

17 Jur 443

M. R. 1874 BELLAIRS v. BELLAIRS.

even if the clause is to be construed as creating a forfeiture on marriage, still such a forfeiture is perfectly valid having regard to the nature of the property, which (to a large extent at least) has arisen from the sale of real estate.

The rule that conditions in restraint of marriage are void is unknown to the common law; it was borrowed by the Ecclesiastical Courts from the canon law, and applies only to gifts over which those Courts had jurisdiction, viz., money legacies and gifts of pure personalty.

A condition in restraint of marriage is valid if annexed to a gift of an estate in fee simple: *Earl of Arundel's Case* (1).

Again, such a condition may be annexed to a portion charged on land: *Pawlett* v. *Pawlett* (2); *Harvey* v. *Aston* (3). In *Scott* v. *Tyler* (4) Lord *Thurlow* says this: "Land devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved) follow the rule of the common law, and such trusts are to be executed with analogy to it." This clearly applies to a fund arising from the sale of real estate.

In fact, the rule of the canon law applies only to pure personalty, and does not apply to funds derived from real estate over which the Ecclesiastical Courts never had any control: *Yates* v. *Phettiplace* (5); *Reynish* v. *Martin* (6); *Marples* v. *Bainbridge* (7).

[The MASTER OF THE ROLLS:—Is there any case of a mixed fund? This is a fund arising from realty and personalty; must it not be kept together? and if so, must not the rule applicable to pure personalty be followed, as was done in *Genery* v. *Fitzgerald?* (8)]

The only decision as to a mixed fund is *Lloyd* v. *Lloyd* (9), where Vice-Chancellor *Kindersley* held that there was no forfeiture; but the question as to the application of the rule to the part of the fund which represented realty was not raised.

(1) Jenk., 6 Cent., Case 26, p. 243; 3 Dyer, 342 b.
(2) 1 Vern. 204, 321.
(3) 1 Atk. 361.
(4) 2 Dick. 712, 719; 2 Bro. C. C. 431.
(5) 2 Vern. 416.
(6) 3 Atk. 330.
(7) 1 Madd. 590.
(8) Jac. 468.
(9) 2 Sim. (N.S.) 255.

It is not universally true that where realty and personalty are to be held on the same trusts a Court of Equity will apply the same rules to both, so as to keep them together. *Forth* v. *Chapman* (1) is a strong instance of the contrary.

[They also referred to *Rishton* v. *Cobb* (2); *Grace* v. *Webb* (3); *Morley* v. *Rennoldson* (4); *Jarman* on Wills (5).]

Mr. *Wilbraham Ford*, for Mr. and Mrs. *Price*, was not called upon.

SIR G. JESSEL, M.R.:—

It is no part of my duty to make new law simply because I think the old law unreasonable; that is the province of the Legislature and not of a Judge. Where I find a point decided, however I may lament the result, I think I am bound to follow the decision, and to construe it fairly, and not seek to evade it or fritter it away by introducing distinctions only invented for the purpose of pronouncing another decision, which in my opinion would be more in conformity with reason. In the present case the law is settled thus far, that a general condition prohibiting marriage, by which a legacy is cut down, is void. I consider that to be the law of the Courts of Equity. It is equally the law of these Courts that a charge on land does not follow the same rule, it follows the rule of the common law, as it is called, as distinguished from the rule of equity. In this particular case the gift is not of property strictly within either definition. It is a gift of the proceeds of the sale of realty directed to be sold under a valid trust for sale, which has been carried out, combined with a gift of the personal estate. This gives rise to two considerations, or rather two questions: first, what rule is to be applied in this Court as regards legacies arising or payable out of the proceeds of the sale of land directed to be sold by a valid testamentary trust; secondly, what rule applies to a mixed fund of the kind in question. There is, however, a preliminary question to be decided: is there or is there not, on the construction of these testamentary instruments, such a condition as that which is prohibited by the rule of Courts of Equity? Now

(1) 1 P. Wms. 663.
(2) 9 Sim. 615; 5 My. & Cr. 145.
(3) 15 Sim. 384.
(4) 2 Hare, 570.
(5) 3rd Ed. vol. ii. p. 45.

M. R. 1874 BELLAIRS v. BELLAIRS.

this preliminary question, I must say—notwithstanding the arguments addressed to me, and considering the instruments, as I am bound to do, irrespective of legal decisions on the subject, but only trying to ascertain their meaning—appears to me very plain. [His Honour then stated the provisions of the will, and read the second codicil, and continued :—]

On these words the case appears so plain that I should have thought it scarcely could be argued. However, it is somewhat curious that on this point two of the cases cited before me have a direct bearing. Neither case is so strong on the question of construction as the one before me, but they are worth referring to because there were similar expressions to be construed there. Those cases are the cases of *Lloyd* v. *Lloyd* (1), which I shall have to refer to for another purpose, and *Morley* v. *Rennoldson* (2), in both of which words much less strong than those used by this testator were held to create a condition of forfeiture; and I feel compelled so to hold in this case.

The question of construction being so decided, I am driven now to the questions of law. As I said before, there is no contest about the rule as to personal estate. There is no contest as to the rule as to charges on land. What is the rule, first of all, as to gifts out of the proceeds of the sale of land directed to be converted? Upon that I feel myself compelled to say that the rule of this Court as to legacies out of the proceeds of the sale of land so directed to be converted is the same as is applicable to personal estate. It is not necessary to go over all the authorities, but looking at *Scott* v. *Tyler* (3), which is a leading case on the subject, I think we must agree that the rule, whatever it is, was derived chiefly from the civil or canon law. The history of the rule appears to be this: it was a rule of the civil law adopted by the Ecclesiastical Courts; then those Courts having adopted it, it was adopted as a rule of the Courts of Equity; but the Courts of Equity did not consider themselves bound by the precise rule of the civil law, but departed from the civil law in most material particulars. Thus, the Courts of Equity held that it did not apply to conditions precedent. Again, they held that it did not apply to a condition restrain-

(1) 2 Sim. (N.S.) 255. (2) 2 Hare, 570.
(3) 2 Dick. 712; 2 Bro. C. C. 431.

ing marriage under a given age, and so on. That is, the rule adopted in our Courts was not the rule of the civil law, it has been modified—it is in fact a new rule, although the reason of its importation was its use in the Ecclesiastical Courts. The rule, therefore, was brought into the Court of Chancery as a rule applying to legacies out of personal estate. Now it so happens that other rules were brought into the Court of Chancery in the same way, and amongst other rules brought into the Court of Chancery in the same way was a rule that a legacy payable to a person at a future time was not contingent; that is, it was held to be a legacy presently given but payable at a future time, and consequently not to be contingent but vested; in other words, though the legatee died under the prescribed age at which the legacy was made payable, the administrator of the legatee became entitled to the legacy. That was adopted in exactly the same way as the other rule, because it was the rule of the Ecclesiastical Court; the only difference was, that being adopted it was not modified. On that Lord Keeper *Guildford*, in *Pawlett* v. *Pawlett* (1), said: "As to a legacy devised by a will, I take the law to be settled, that where it is *debitum in præsenti*, though not payable till a future day, it shall go in a course of administration; and the reason is, that it takes place on the personal estate, and depends purely on a will, which is to be construed and expounded in the Spiritual Court; and in such case it is but just that the legacy should go in a course of administration, in regard it comes out of the personal estate." So that the rule came to our Courts in precisely the same way. Now the same question arose as to the mode in which this fund, which lies between the two, namely, the fund which arises from the sale of land directed to be sold, and which is found by a Court of Equity in a state of money, is to be dealt with, and as to what rules apply to such a case; and that question was discussed and decided in the case of *Re Hart's Trusts* (2), and it was decided there by the Lords Justices that in that class of cases the money found in the shape of money, though it arose from the proceeds of land directed to be sold by the testator, was to be treated for the purpose of construction, and especially for the purpose of the rule as to vesting,

(1) 1 Vern. 323

(2) 3 De G. & J. 195.

M. R. 1874 BELLAIRS v. BELLAIRS.

as falling within the class of personal estate. That, I think, is quite clear from the judgment of both the Lords Justices. It may be said that this is a mere analogy. If so, it is a very cogent analogy. Both rules are derived from the same Court, the Spiritual Court; both adopted in equity for the same reason. They are rules governing personal estate, and then when the question arises under which class this particular case falls, the Court of Appeal has decided as to one rule that it falls under the personal estate class. But I am not sure that it is a mere analogy. Is the rule one of policy or one of construction? If it is a rule of construction, then it is more than analogy. Now if the rule were really one of policy you never could evade it by a change in the form of words. But it is admitted you can so evade it; that if you put it in the form of limitation—if, for example, you had given this life interest to this young lady until she married, and then upon marriage had given it over—it is not disputed that that would have been good. Therefore, it seems to be a rule of construction. The reason of the rule may have been policy; but the actual question the Court has to decide is whether, according to the construction, it is a condition or a limitation, and if it is found to be a condition, then the reason which made that condition *in terrorem* only may have been founded on policy or supposed policy; but it is the construction that decides that it is to be *in terrorem*, and therefore, strictly speaking, it is a question whether the testator has absolutely prohibited the marriage, or whether he has intended merely to threaten that which he knows cannot be carried into effect, because the Court construes it to be *in terrorem*. I think, therefore, the rule is rather to be considered an arbitrary rule of construction than to be founded on public policy, and I should hold, if it were merely a gift of money arising from the sale of real estate, that it is governed by the rules applicable to personal legacies.

But there is another ground upon which again I am bound by authority. This is a mixed fund; the proceeds of realty and personalty directed to be converted are thrown together as an entire fund. Now the rules as to mixed funds are very different from the rules governing simple funds, arising from one or the other kind of property. The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture,

M. R.
1874
BELLAIRS
v.
BELLAIRS.

so to say, was giving the funds to the same objects, that has been carried out. The case of *Genery* v. *Fitzgerald* (1) is a notable example. That was not the case of a true mixed fund, but a simple gift of realty and personalty to the same object. When we come to true mixed funds we find the law has been largely modified in favour of the rules regulating personal estate, as is shewn by the decisions in the well-known cases of *Roberts* v. *Walker* (2), *Boughton* v. *Boughton* (3), and *Tench* v. *Cheese* (4). Therefore, if it depended simply on this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply.

But I am not left to decide this upon any notion of my own. The exact point was decided by an eminent Judge, Vice-Chancellor *Kindersley*, in *Lloyd* v. *Lloyd* (5), and though it is not mentioned in the report, neither he nor, I think, any of the counsel in the case, could have missed it. It was argued exactly as if it were a pure gift of pure personalty, everybody admitting that was the law to govern. The Vice-Chancellor treats it in the same way, noticing in the judgment that there was realty and personalty, and he gives his judgment as to the conditions, and he held the condition to fail as regards the gift over on the marriage of the single woman. So that the case of *Lloyd* v. *Lloyd*, as regards the question of mixed fund, is precisely in point, and I should hold myself bound by that decision, even were it my opinion, which it is not, that it is not a correct decision according to the analogy of decided cases. As I have said before, whatever my opinion may be as to the law, finding it settled, as I do, I must decide contrary to the intention of this gentleman, which appears to me to be a very reasonable one, because he obviously wished to provide for his daughters while single an ample income, thinking when they married they would not require so much. I regret not being able to carry it out, but I must decide according to what I consider the law is, that this condition is *in terrorem* and void.

Solicitors: Messrs. *W. & A. Ranken Ford.*

(1) Jac. 468.
(2) 1 Russ. & My. 752.
(3) 1 H. L. C. 406.
(4) 6 D. M. & G. 453.
(5) 2 Sim. (N.S.) 255.

M. R.

1874

July 17.

GRAVELY *v.* BARNARD.

[1874 G. 53.]

Bond—Condition in Restraint of Trade—Consideration—Continuance of previous Engagement—Right to dismiss at Will—Interlocutory Injunction.

14 Ch D 354
359

A legal consideration of any value is sufficient to support a contract in partial restraint of trade; and the Court will not inquire as to its adequacy.

The Plaintiff, a surgeon, engaged the Defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the Defendant, previously to going up to pass his examination, executed, at the request of the Plaintiff, a bond, which was conditioned to be void if the Defendant should not practise within certain limits, but which contained no express agreement on the part of the Plaintiff to continue the Defendant's employment. The Defendant remained in the Plaintiff's employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from so doing:—

Held, that an agreement by the Plaintiff to continue the Defendant's employment on the old terms could be inferred; that there was consideration to support the bond; and that the Plaintiff was entitled to an injunction:

Held, also, that the point was one that ought to be decided on motion without waiting for the hearing.

THE Plaintiff was a surgeon at *Newick*, in the county of *Sussex*, and in 1864 engaged the Defendant (who was not then qualified to practise, but was studying with the view of passing the examination of the *Society of Apothecaries*) to assist him in his practice. The Plaintiff alleged that at the time when he so engaged the Defendant it was verbally agreed between them that the Defendant, if he became qualified to practise, would not practise at *Newick* or the neighbourhood; but this was denied by the Defendant. In 1870 the Defendant was about to go up to pass his examination, and the Plaintiff required him to execute, and he did execute, a bond, dated the 12th of March, 1870, in the penal sum of £1000. The condition of this bond was as follows:—

"Whereas the said *Richard Gravely* some time since took the above bounden *Thomas Barnard* into his employ and confidence as an assistant in his profession or business of surgeon, apothecary,

and man midwife, which he now carries on, and has for some time past carried on at *Newick* aforesaid, which employment was to continue so long as the said parties hereto should agree. And whereas the said *Thomas Barnard* at the time of such engagement did not, nor does he at present, hold the requisite qualifications to enable him to practise the professions aforesaid or any of them, but being now about to apply for a certificate from the *Society of Apothecaries of London*, on obtaining which he will possess the requisite qualifications to practise his profession, the said *Richard Gravely* hath requested him the said *Thomas Barnard* to enter into the above written bond or obligation with the condition for making void the same which is hereinunder written; and for the consideration aforesaid the said *Thomas Barnard* hath agreed to enter into such bond or obligation with such condition for making void the same as is hereinafter contained. Now, therefore, the condition of the above-written bond or obligation is such that if the above bounden *Thomas Barnard* shall not, nor will at any time or times hereafter, set up, practise, carry on, or exercise directly or indirectly, either for himself alone or in partnership or in collusion with any other person or persons whomsoever except the said *Richard Gravely*, or in any manner whatsoever, the said several professions or businesses of a surgeon, apothecary, or man midwife, or any or either of them, or any similar or like profession or business, within the said parish of *Newick*, or within the distance of ten miles thereof (the town of *Lewes* in the said county excepted), during so long a time as the said *Richard Gravely*, or any person or persons to whom he shall sell or dispose of his said business of a surgeon, apothecary, or man midwife, or to whom he may assign or make over the same, shall carry on, practise, or exercise the same professions or businesses, or any or either of them, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force and virtue."

The Defendant failed to pass his examination, and returned to the Plaintiff, and acted as his assistant; but shortly afterwards the Plaintiff gave the Defendant notice to leave his employ, and the engagement between the Plaintiff and the Defendant terminated in June, 1870.

In March, 1874, the Defendant passed his examination, and

M. R. 1874 GRAVELY v. BARNARD.

began to practise within the limits mentioned in the bond. The Plaintiff thereupon instituted this suit to restrain him from so doing, waiving by his bill all penalties recoverable at law under the bond.

A motion was now made for an injunction. The argument turned entirely on the above-mentioned bond, no reliance being placed on the alleged verbal agreement at the commencement of the engagement.

Mr. *Waller*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

The Court will grant an injunction although the agreement between the parties in point of form is for the payment of a penalty for non-observance of certain terms: *Clarkson* v. *Edge* (1); *Fox* v. *Scard* (2); *French* v. *Macale* (3). A promise to abstain from carrying on business within reasonable limits is good, if made for valuable consideration: *Mitchel* v. *Reynolds* (4).

[The MASTER OF THE ROLLS:—The real question here appears to be, Is there a consideration for the bond?]

The bond is under seal, and that of itself imports a consideration. But besides that the meaning of the whole transaction was that the employment of the Defendant by the Plaintiff was to be continued on the same terms as before if the Defendant signed the bond; and the employment was so continued for several weeks, so that valuable consideration was given for the bond. It is now clearly settled that the Court will not in these cases inquire into the quantum of the consideration: *Hitchcock* v. *Coker* (5). The decision in *Howard* v. *Woodward* (6) was given on a bond almost identical in its terms with that in question here, and governs this case.

[They also referred to *Davidson's* Precedents in Conveyancing (7); *Roy* v. *Duke of Beaufort* (8); *Sainter* v. *Ferguson* (9).]

(1) 33 Beav. 227. 10 Jur N.S. 711
(2) Ibid. 327.
(3) 2 D. & War. 269.
(4) 1 P. Wms. 181.
(5) 6 A. & E. 438.
(6) 34 L. J. (Ch.) 47. 10 Jur N.S. 1123.
(7) 3rd Ed. vol. ii. p. 525.
(8) 2 Atk. 190.
(9) 7 C. B. 716; 1 Mac. & G. 286.

Mr. *Southgate*, Q.C., and Mr. *Locock Webb*, for the Defendant:—

The sole question is, was any consideration given for this bond? The agreement alleged to have been entered into at the commencement of the engagement is disputed by the Defendant, and it is not for the purposes of this argument to be relied on. Then as to the bond being under seal, it is expressly laid down in *Mitchel* v. *Reynolds* (1) (a case on a bond) that the consideration for a contract in restraint of trade must always be shewn. *Primâ facie*, such a contract is bad; and it will only be upheld if there is adequate consideration for it: *Logan* v. *Wienholt* (2); *Chesman* v. *Nainby* (3); *Young* v. *Timmins* (4).

[The MASTER OF THE ROLLS:—If *Young* v. *Timmins* turned on the question of consideration, it must be treated as overruled by *Hitchcock* v. *Coker* (5).]

At all events, there is no consideration whatever shewn here.

[The MASTER OF THE ROLLS referred to *Davis* v. *Mason* (6).]

In that case the Defendant gave the bond, on entering into an engagement, to serve the Plaintiff for so long as the Plaintiff should think fit. We admit that if this bond had been given at the commencement of the engagement between the Plaintiff and the Defendant, it would have been good; but it was not given at the commencement of the engagement, and there was no agreement to continue the employment after the execution of the bond; and we say, therefore, that the bond is invalid in law: *Homer* v. *Ashford* (7).

SIR G. JESSEL, M.R.:—

The sole question in this case is, whether there is a sufficient consideration for the bond. The case of *Hitchcock* v. *Coker* has settled what consideration is sufficient in these cases. It is enough, in the words of Lord Chief Justice *Tindal* (8), if there is "a legal consideration, and of some value." Therefore if, in the pre-

(1) 1 P. Wms. 181.
(2) 1 Cl. & F. 611.
(3) 1 Bro. P. C. 234, Toml. Ed.
(4) 1 C. & J. 331.
(5) 6 A. & E. 438.
(6) 5 T. R. 118.
(7) 3 Bing. 322.
(8) 6 A. & E. 457.

M. R. 1874 GRAVELY v. BARNARD.

sent case, the Plaintiff can shew that he gave any valuable consideration, however small, that is enough to warrant the granting of an injunction, the Court not taking upon itself to decide upon the adequacy of the consideration.

Now as to what is valuable consideration in these cases there is some authority. In *Davis* v. *Mason* (1) the taking of a man into service for so long a time as the master should please was held to be valuable consideration. Lord *Kenyon*, in giving judgment, said: "A bond in restraint of trade cannot be arbitrarily taken, and without consideration; some consideration must appear. But here, the Plaintiff being established in business as a surgeon at *Thetford*, the Defendant wished to act as his assistant with a view of deriving a degree of credit from that situation; on which the former stipulated that the Defendant should not come to live there under his auspices and steal away his patients; this seems to be a fair consideration for the bond." Is there any difference between an agreement to take into service so long as the master pleases, and an agreement to continue an existing service so long as the master pleases, that existing service being terminable at the will and pleasure of the master? I can see none; and the only question is, can I reasonably infer from the instrument before me an agreement to continue the Defendant's employment? Now upon the Defendant's construction the instrument has no meaning; but it is the duty of the Court to construe an instrument so that if possible it may have a meaning; and if that meaning can be fairly got at, the Court must give effect to it. [His Honour then read the recitals in the bond, and continued:—]

What do the words "for the consideration aforesaid" mean? The Defendant says they mean nothing, that though the instrument speaks of a consideration, none was given. I cannot adopt that view. I think it must mean that there was an agreement by the Plaintiff and Defendant that the connection between them was not to be terminated there and then, and if that is the meaning, the case falls within *Davis* v. *Mason*.

But it may be said, Is it right, in such a case as this, to infer such an agreement? Must not the agreement be in express

(1) 5 T. R. 118, 120.

terms? Now on that point the authorities appear to be all one way. In the leading case of *Mitchel* v. *Reynolds* (1) the condition of the bond was, that whereas the Defendant had assigned to the Plaintiff a lease of a messuage and bakehouse for the term of five years, if the Defendant should not exercise the trade of a baker within that parish, or in case he did, should pay a sum to the Plaintiff, then the obligation to be void. No consideration is recited there; the assignment is mentioned in the past tense, and therefore must have been previously executed; yet the Court inferred a consideration; they found that the Plaintiff took a bakehouse from the Defendant, and that the Defendant agreed not to carry on his business. So in *Davis* v. *Mason* (2) the consideration was inferred by Lord *Kenyon* and the Judges of the Court of King's Bench. The condition of the bond there simply recited that the Plaintiff had taken the Defendant for his assistant, and that the Defendant had agreed not to exercise the business on his own account; yet Lord *Kenyon*, in the judgment I have read, says that there was a consideration. That was arrived at by inference. Looking, then, at these two cases, in which remedy was given on an instrument in which there was no express statement of the consideration, but the consideration was inferred, I think I am bound to grant the injunction in this case.

I also think that this is one of the cases in which I am bound to decide the question of law on the motion, and not to leave it to the hearing; to do otherwise might be to ruin one of the parties.

Solicitors: Mr. *H. M. Phillips*, agent for Mr. *H. J. Jones*, *Lewes*; Mr. *James Mote*.

(1) 1 P. Wms. 181. (2) 5 T. R. 118.

M. R.

1874

June 8;
July 30.

DUNNE *v.* ENGLISH.

[1872 D. 115.]

Principal and Agent—Agent for Sale—Purchase by Agent—Disclosure of Material Facts—Burden of Proof—Practice—Evidence—Non-production of Witness for Cross-Examination—Payment into Court after Decree.

10 Ch 521 n
5 Ch D 419
6 Ch D 380
397
8 Ch D 86
36 L T (N S) 126
23 Ch D 307

An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry.

In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the Plaintiff and not corroborated.

At the hearing of a cause on replication, the Plaintiff proposed to read the affidavit of a witness occupying an official position in the *United States*. Notice to cross-examine this witness had been given, and he had come over to this country for the purpose of being cross-examined, but had been obliged to return before the cause came on to be heard. The Plaintiff had given the Defendant only one day's notice before the witness left the country:—

Held, that the affidavit could not be read.

A Defendant whose affidavit filed on an inquiry discloses that he has money in his hands may be ordered to pay it into Court after decree and before further consideration.

THE Plaintiff was, in and previously to May, 1871, interested to the extent of one-fourth in a company called the *Richmond Mining Company*, which owned certain mines and works in the State of *Nevada* alleged to be worth $100,000 (£20,000). In that month the Plaintiff obtained from the company a promise to sell the mines for $250,000 (£50,000); and it was arranged between the Plaintiff and Defendant (who were both then in *California*) that the Defendant should at once proceed to *London* and endeavour to negotiate a sale of the mines, on the joint account of the Plaintiff and Defendant, for such sum over £50,000 as could be obtained, and that they should share the expenses and profits of the sale equally. The Defendant accordingly proceeded to *London*, while the Plaintiff remained in *America* for the purpose of obtaining from the company a binding agreement of sale, and attending to other matters of business in connection with the mines.

An agreement in writing, dated the 23rd of June, 1871, was entered into between the *Richmond Mining Company* and the Plaintiff, whereby the company agreed to sell the mines and works to the Plaintiff at the price of $250,000, one half to be paid on the 1st of September, 1871, and the other half on the 1st of January, 1872; and it was provided that if the Plaintiff should not make a sale of the property on or before the 1st of September, 1871, or if he should not then have complied with the terms of the agreement by the payment of the said sum of money, the agreement should be void: and it was further provided that the vendors might at any time cancel the agreement, or, at their option, increase the amount for which the property was to be conveyed, by giving the Plaintiff notice by letter or telegram, subject, however, to this, that if on receipt of such advice or notice the property should have been sold, then the said notice should have no binding effect.

Having obtained this agreement, the Plaintiff forwarded it to the Defendant, who received it about the 19th of July. Immediately after so forwarding it, the Plaintiff himself started for *London*, where he arrived on the evening of the 23rd of July. On the same evening the Plaintiff and Defendant had a long and private conversation on the subject of the mines and works; and in the result they determined to sell the property for £60,000 to certain persons who were stated by the Defendant to be ready and willing to give that price for it, but whose names were not given. The Defendant promised to go and see the persons referred to next day, and endeavour to bring the matter to a close; and on the 25th of July, 1871, he told the Plaintiff that the parties to whom he had before referred had agreed to purchase the property for £60,000, and that a written agreement would be ready the next day. On the 26th of July the Plaintiff and Defendant met to discuss the terms of the agreement; and on the 28th of July a written agreement between the Plaintiff and Defendant was executed, whereby the Plaintiff agreed to sell the property to the Defendant at the price of £55,000. On the 3rd of August a limited company was registered in *England* for the purpose of purchasing and working the mines; and this company did shortly afterwards purchase the property sold by the Plaintiff for £200,000, of which £150,000 was paid in cash and £50,000 in shares. A

M. R. 1874 DUNNE v. ENGLISH.

settlement of accounts took place between the Plaintiff and Defendant in December, 1871, on the footing that there had been a sale at £60,000, and that the Plaintiff was to have half the £10,000 profit thus realised, less half the expenses; and the Plaintiff received from the Defendant a sum of £3725 4s., being his share of profits on that footing, and gave a receipt in full for all moneys, claims, and demands payable or that might arise under the contract between him and the Defendant. The company had proved successful, and the shares thereof were valuable.

The original bill in this suit was filed in June, 1872, and was afterwards amended; and, as amended, it contained allegations to the following effect. As regards the conversation which took place between the Plaintiff and Defendant on the 23rd of July, the Plaintiff averred that the Defendant, in alluding to the persons who he said were ready and willing to give £60,000 for the mines, so expressed himself as to make the Plaintiff understand that there were several of them, and that they would purchase the mines out and out for their own benefit; and that nothing passed which could lead the Plaintiff to suspect, and he did not suspect, that the Defendant was to retain any interest in the mines or to derive any profit from the sale other than that which he would derive as a member of the partnership, consisting of the Plaintiff and himself. As regards the meeting on the 26th of July, the Plaintiff averred that the Defendant then requested that the agreement which they had met to discuss should take the form of a sale to himself, giving as a reason for the request that the parties with whom he had been dealing did not know the Plaintiff, and they would prefer to deal with the Defendant as the person who had conducted the negotiations up to that time, and that by having the property in his own name he could arrange matters more satisfactorily. The Defendant (according to the Plaintiff) also proposed on that occasion that, as the purchase-money was £60,000, giving a profit of £10,000, the agreement might be framed as one for a sale for £55,000, being £60,000 less the Defendant's agreed share of the profits, which could be provided for in his arrangements with the persons who were purchasing the mines, and whom he referred to as the syndicate; and he stated that, as the syndicate knew that he was to make a profit of

£5000 out of the transaction, there would be nothing improper in so framing the agreement. The amended bill also alleged that shortly after the date of the agreement the Plaintiff noticed that the Defendant was taking a great interest in the formation of a company which was intended to work the mines: that he was told by the Defendant that the syndicate was forming this company, and on inquiring who composed the syndicate was told by the Defendant that the names were not to be disclosed; but that the Defendant admitted that the syndicate had allowed him to have an interest in it: that the Plaintiff then asked that he also might have the privilege of taking a share in the syndicate, and offered to subscribe to the extent of £10,000: that the Defendant said he did not know whether the syndicate would allow the Plaintiff to subscribe, but promised to inquire, and he subsequently told the Plaintiff that the syndicate declined to allow him to have a share on the ground that it was all taken up. It also alleged that there was no sale of the mines to a syndicate at all, and that, though the Defendant at the time alleged the sale to be merely nominal and a matter of form, the Defendant in truth intended the agreement of the 28th of July, 1871, to effect a purchase of the mines from the Plaintiff for his own benefit: and that the Defendant in fact sold the mines to the company, a Mr. *Fisher* rendering some assistance in the matter, and receiving some portion of the profits: and that the Plaintiff had given his receipt on the occasion of the settlement in utter ignorance that he had been otherwise than fairly treated by the Defendant. The bill prayed for a declaration that the agreement of the 28th of July, 1871, was inoperative to determine the partnership then existing between the Plaintiff and Defendant, and that the Plaintiff was entitled to share equally with the Defendant in the profits made on the sale of the mines and works by the Defendant under the title conferred by that agreement, and that the Defendant was bound to make over to the Plaintiff one half of the profits realised by such sale, the Plaintiff offering to contribute one half of the expenses incurred in and about such sale, and to bring into account the amount paid to him on the settlement of account; and for an account on the footing of the declaration.

The Defendant, by his answer to the original bill, admitted that

M. R. 1874 DUNNE v. ENGLISH.

on the 23rd of July he told the Plaintiff that he thought he might be able to negotiate a sale outright for £60,000; but he denied that he said he knew some persons who were ready and willing to give £60,000 for the mines and works, or that there was any ground for imputing to him that he intended to mislead or conceal anything from the Plaintiff. He alleged that on the evening of the 24th of July he informed the Plaintiff that if a sale were made he himself would have to become one of the purchasers: that it was on that occasion determined that the mines and works should be sold for £60,000; and he admitted that he thereupon promised to go and see the parties who he thought would be most likely to join him in the purchase. He stated that he thereupon communicated with Mr. *Morton Coates Fisher*, and asked him to go into the speculation with the Defendant, and join him in buying the property: that *Fisher* did agree to do so, provided the Defendant would examine thoroughly the property and deposit a sum of £2000 to cover certain costs: that *Fisher* and the Defendant agreed, subject to such condition (which was subsequently performed), to enter into a partnership, and as to the property, to share equally profit and loss: but that this agreement was made subject to the stipulation that if *Fisher* could get other persons to join in the purchase and advance money he should do so; and that it was further agreed between them that as it was uncertain who else he might induce to join them, the written agreement for the sale should take the form of an agreement between the Plaintiff and Defendant. The Defendant admitted that, under these circumstances he did, on the 25th of July, tell the Plaintiff that the parties to whom he had referred (and by whom he meant, and he verily believed that the Plaintiff understood him to mean, the parties who he had thought would join him in the purchase,) had agreed to purchase the mine and works for £60,000, and that a written agreement would be ready the next day: and admitted that the persons who agreed to purchase the mine and works were *Fisher* and himself: and that in the events which happened no other persons became purchasers. He insisted that he always told the Plaintiff that he was to be one of the purchasers.

By his answer to the amended bill the Defendant admitted that he spoke of "persons" or "parties" in the plural number, because

he considered that *Fisher* would endeavour to procure, and that there was a probability of his procuring, other persons to join in the purchase.

The Defendant admitted that after the date of the agreement the Plaintiff inquired who composed the syndicate, and that he told him that he would not disclose their names.

The cause now came on to be heard on replication. The Plaintiff and Defendant respectively made affidavits verifying the statements in the amended bill and answers; and they were cross-examined in Court. The result of the cross-examination will be found in the judgment. It appeared from the evidence that the purchase-money of £60,000 was to be provided by *Fisher*.

The Plaintiff, in support of his case, had filed an affidavit by a gentleman occupying an official position in the *United States*. The Defendant gave notice to cross-examine this witness, and he came over to this country for that purpose, but was obliged to return before the cause came on to be heard. The Plaintiff gave notice to the Defendant that the witness was about to leave in order that the cross-examination might be taken before a special examiner, but it appeared that only one day's notice was given.

Upon the Plaintiff's counsel proposing to read the affidavit the Defendant's counsel objected.

SIR G. JESSEL, M.R.:—

The evidence must be rejected. The witness ought to have been here for cross-examination. It is not enough that he was here at one time; if he could not remain, the Plaintiff ought to have taken the evidence by commission and postponed the hearing.

Mr. *Southgate*, Q.C., Mr. *Fry*, Q.C., and Mr. *Kekewich*, for the Plaintiff, submitted that the Defendant had not made a full disclosure of his interest as purchaser under the agreement of the 28th of July, 1871, and must account for all the profits he had made.

Mr. *Field*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Graham Hastings*, for the Defendant, contended that on the Plaintiff's own shewing

M. R. 1874 DUNNE v. ENGLISH.

the Defendant had told the Plaintiff shortly after the date of the agreement, and long before the settlement of accounts, that the syndicate had allowed him an interest in the purchase. The Plaintiff had sufficient knowledge to put him, at all events, on inquiry, and he could not now complain.

SIR G. JESSEL, M.R. :—

In this case it is admitted that the Defendant stood in a fiduciary relation towards the Plaintiff. The Plaintiff and Defendant were partners for the purpose of selling a mine, called the *Richmond Mine*, situate in one of the new States of *America*, with certain smelting works belonging to it. It is asserted by the witnesses, apparently with confidence, that the mine and smelting and other works were worth, in June, 1871, 100,000 gold dollars. It belonged to a company which is styled the *Richmond Company*. The Plaintiff, Mr. *Dunne*, was a shareholder or part owner of that mine to the extent of one-fourth. He obtained from the company an agreement or option that within a limited time he might be allowed to purchase the mine for $250,000, or £50,000 sterling. Now, of course, if the mine and works were only worth £20,000, that was an option that could only be exercised on the assumption that he sold the mine for a larger sum before he bought it of the company. He associated with himself as a partner in this adventure (namely, a sale of the mine to English people and shareholders in *England*, at an advance on this optional price) Mr. *English*, who is, like the Plaintiff, a subject of the *United States*. They two together were to contrive to induce the English public to give some larger sum for the mine than the optional sum. Mr. *English* first proceeded to *England*. Mr. *Dunne* followed him at a subsequent date. Mr. *Dunne* had not got all the documents which were considered necessary with a view to selling the concern to English individuals or English companies to be formed for the purpose of buying it, and therefore Mr. *English* was not in a position to make what may be called any final or concluded arrangement before he got those documents, but he did negotiate. Mr. *English* received the documents about the 19th of July, 1871, and then he was in a position to negotiate seriously,

and he went to a Mr. *Fisher*, and there seems to have been, not a final arrangement, but a discussion and conversation, in which £60,000 was named as the price. The exact day on which this conversation occurred is perhaps not strictly proved. It was a day or two after the 19th of July and before the 23rd of July, 1871. On the 23rd of July, 1871, which was a Sunday, the Plaintiff arrived in *England*. The Defendant, his partner, meets him at *Euston Station;* they go together to Mr. *English's* house; and the Plaintiff resides with Mr. *English* at his house in *London* until the 5th of August, when he goes back to the *United States*. The momentous events which determine this case occurred between those dates. On the night of Sunday, or rather early in the morning of Monday, they had a long conversation together. Mr. *Dunne* asserts that Mr. *English* did not tell him that he, Mr. *Dunne*, should have to sell the mine to Mr. *English* as one of the purchasers; Mr. *English* says he did tell him so, or used words to that effect. Now Mr. *Dunne's* position and Mr. *English's* position as partners—for they were partners—was subject to this risk, that the option which they had obtained from the *Richmond Company* only extended over sixty days from the 1st of July, and reckoning certain times to be occupied in journeys to and fro there was something like about fifteen days for negotiation when Mr. *Dunne* arrived in *England*. The exact number of days does not much matter, but both parties knew there was a risk of losing this option, which both of them considered a valuable option, whatever the real value of the mine might be, for they both anticipated they could get much more, and certainly there was a ground for that anticipation, because there had been a negotiation in which £60,000 had been mentioned by Mr. *Fisher* as the sum to be given. Therefore they were both anxious the option should not be lost, and the Defendant knew that the Plaintiff was anxious not to lose the expenditure—for there was some expenditure, though not to a very large amount, incurred by him—or to lose the chance of profit. The Defendant states that the Plaintiff wished to sell out and out for £60,000. There was a reason for his so selling. The time was short, and he was anxious to sell and have done with it. The Defendant asserts that he told the Plaintiff that he (the Defendant) would be one of the purchasers. Now we must

M. R. 1874 DUNNE v. ENGLISH.

recollect what the position of the parties was. The Defendant was not only in law the agent of the partnership to sell (being himself a partner, and every partner being an agent of the partnership), but he was in fact the agent who had been engaged in negotiating the sale. He was not merely a theoretical and legal agent, but he was the active agent for carrying on this sale, and being such agent he was bound, as I understand the law, if he intended to purchase himself or to take a share in the purchase, to tell the Plaintiff so, and, as I think, to tell him more than that, to tell him what share in the purchase he intended to take.

Now the first question I have to decide is, did he tell him so? According to the rule which I consider established, the *onus probandi* (that is, the obligation of proving that he told him so) lies on the Defendant. Can he prove it by simply saying that he told him so, the Plaintiff positively denying the statement? Is there any corroboration? I do not think there is anything worthy to be called corroboration, but I have seen the Plaintiff and the Defendant in the box, and I am asked to believe the one and disbelieve the other. I cannot say that either of them made a very satisfactory witness. The Plaintiff was cross-examined as to certain statements he made as to his having been in difficulties at particular times, and I must say the answers he first gave were not altogether reconcilable with the answers he was compelled to give when certain documents were put into his hands. I must also say it does appear that he is a man not extremely scrupulous about the obligations of veracity, for he certainly suggested to his partner that, in reference to another transaction, he might conveniently make a false statement, with a view of inducing the public to buy certain shares in a company which might otherwise be depreciated if it were known the manager of the company was selling the shares. On the other hand, the Defendant is compelled to admit in his answer that what he did say to the Plaintiff was not true. In his answer to the amended bill he is obliged to admit that he told the Plaintiff there were several persons willing to purchase; speaking of persons in the plural, there being, in fact, only one person, namely, Mr. *Fisher*. The statement in the first answer is this: "Under these circumstances I did, on the 25th of July, 1871, tell the Plaintiff that the parties to whom I referred

(and by whom I meant, and verily believe the Plaintiff understood me to mean, the parties who I had thought would join me in the purchase) had agreed to purchase the mine and works for £60,000." In his second answer he is obliged to say: "I spoke of 'persons' or 'parties' in the plural" (that not being true), "because I considered that the said *Morton Coates Fisher* would endeavour to procure, and that there was a probability of his procuring, other persons to join him and myself in the purchase. I had no other reason for speaking of persons or parties in the plural, and certainly I did not intend to mislead the Plaintiff by any such expression." Nothing could be easier than to say, "Mr. *Fisher* has agreed to purchase with me;" but he represents to the Plaintiff that there were several persons when there was only one. He states as a positive fact that there is only one, and when he is interrogated a second time he can only suggest that there were other persons coming in. Both as regards the Plaintiff and the Defendant, I am sorry to say that, having seen both of them in the witness box, their mode of answering questions is not such as is satisfactory to my mind. The hesitation and the long delays of the Defendant were remarkable; and, not only prevarication, but something like mis-statement, was extracted from the Plaintiff in his cross-examination. I cannot say, therefore, that I am at liberty to credit one or discredit the other. I must hold an even hand between them, and set off the assertion of one against the assertion of the other. That being so, I am of opinion that the assertion of the Defendant, that he told the Plaintiff he was to be one of the purchasers, is not proved, and having decided that the *onus probandi* is on him, that alone would dispose of the case, because nothing is better settled than that an agent, purchasing for himself, must tell his principal he is the purchaser, or one of the purchasers.

But even assuming the Defendant's version is correct, I think I must arrive at the same legal conclusion. It is not enough for an agent to tell the principal that he is going to have an interest in the purchase, or to have a part in the purchase. He must tell him all the material facts. He must make a full disclosure. Now, if I may say so, with great respect, I do not know that I could put the case better, or state the law more clearly, than is done by Lord

M. R. 1874 DUNNE v. ENGLISH.

St. Leonards in the case of *Murphy* v. *O'Shea* (1). The marginal note, which is a very fair representation of the judgment, is this: 'If, in a transaction between principal and agent, it appears that there has been any underhand dealing by the agent, *ex. gr.*, that he has purchased the estate of the principal in the name of another person, instead of his own, however fair the transaction may be in other respects, it has no validity in a Court of Equity." Lord *St. Leonards* says (2): "One thing admits of no dispute: the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent—that he has made use of another person's name as a purchaser, instead of his own—however fair the transaction may be in other respects, from that moment it has no validity in this Court." Again (3), he states thus the other rule about full disclosure: "This, therefore is a case, not merely of an agent who had his principal in his power, but one in which the agent had full knowledge of the rule of the Court; which, however, does not prevent an agent from purchasing from his principal, but only requires that he should deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property." It must be a full disclosure of all he knows; that, of course, means everything material which he knows. The point came before the same Lord Chancellor in another case of *Molony* v. *Kernan* (4). He says: "As to the merits, it is not denied that an agent may take a lease from his principal." Purchasing or taking a lease in this Court is the same thing. "The great case of *Lord Selsey* v. *Rhoades* (5), before Sir *John Leach*, which afterwards went to the House of Lords (6), established this; but it must always be difficult to sustain such a lease in this Court. It must be proved that full information has been imparted, and that the agreement has been entered into with perfect faith." That is, the agent must prove those things—good faith and full information. I will only read a few words from another well-known case, *Lowther* v. *Lowther* (7), in which Lord *Erskine*, then Lord Chancellor, states the doctrine as

(1) 2 J. & Lat. 422.
(2) Ibid. 429.
(3) Ibid. 425.
(4) 2 D. & War. 31.
(5) 2 S. & S. 41.
(6) 1 Bli. 1.
(7) 13 Ves. 95, 102.

Lord *Eldon* had laid it down: "Considering the Defendant *Bryan* as an agent, the principle upon which a Court of Equity acts in cases of this kind is very properly admitted; having been settled in many instances, particularly in the time of Lord *Eldon;* resting upon grounds connected with the clearest principles of equity and the general security of contracts, viz., that an agent to sell shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed." So that the older authorities and the modern authorities agree.

Now, what is the meaning of "knowledge which he himself possessed"—"full disclosure of all that he knows?" Is it sufficient to say that he has an interest? Is it sufficient to put a principal on inquiry? Clearly not. Upon that point I have before me the case of *Imperial Mercantile Credit Association* v. *Coleman* (1). There is a passage in the argument of the counsel for the Appellants which, I think, very fairly and properly states the law: "It is not enough to say that the directors were sufficiently informed to be put upon inquiry. They ought in such a case to have the fullest information given to them, and ought not to be driven to inquiry;" for which two cases are cited: *Fawcett* v. *Whitehouse* (2) and *Hichens* v. *Congreve* (3). I take it that is a correct statement of the law. In that case the Defendant *Coleman* was a director of the company. He brought a purchase to the company in which he was interested as broker, and took a large commission. He told the other directors that he had an interest, and they were aware that his business was that of a stockbroker, and that he had a commission, so that they knew the nature of his interest though they did not know the amount. He had a large commission. Lord *Chelmsford,* in addressing the House of Lords, says this (4): "It was, however, contended that Messrs. *Knight* and *Coleman* were known to be stockbrokers, and that, therefore, declaring that they had an interest in the transaction conveyed all the requisite information that they were interested in that character. It was answered, however, that the commission of brokers upon placing shares and debentures varied considerably

(1) Law Rep. 6 H. L. 189, 194.
(2) 1 Russ. & My. 132.
(3) 1 Russ. & My. 150, n.
(4) Law Rep. 6 H. L. 201.

M. R. 1874 DUNNE v. ENGLISH.

according to the varying character of each transaction; and therefore the knowledge that Messrs. *Knight* and *Coleman* were acting as stockbrokers afforded very scanty information as to the nature of their interest." The directors knew Messrs. *Knight* and *Coleman* had an interest, and they knew it was an interest by way of commission; but because they did not know the amount of commission and did not ask, it was held that *Coleman* was liable to make over to the company the whole profit he obtained from the transaction. Lord *Chelmsford* goes on afterwards (1): "There was, therefore, the more reason for disclosing the real nature of the transaction; and as it is almost admitted that without the protection of the article, the principle applicable to his fiduciary position would have prevented his making a profit to himself out of the funds of the association, so his non-compliance with the conditions of that article leaves him exposed to the application of the principle, and liable to refund the profit which he must be considered to have received in trust for the association." That shews that even a statement which would in other cases be constructive notice sufficient to put the party on inquiry will not be sufficient in the case of principal and agent—that for reasons of policy he must not only put the principal on inquiry, but must give him full information and make full disclosure.

Now, assuming Mr. *English* told the Plaintiff he was interested in the purchase, what else did he tell him? All he told him is this: "I did, on the 25th of July, 1871, tell the Plaintiff that the parties to whom I had referred (and by whom I meant, and verily believe the Plaintiff understood me to mean, the parties who I had thought would join me in the purchase) had agreed to purchase the mine and works for £60,000, and that a written agreement would be ready the next day." Therefore all he told him was a sale outright for £60,000 to several parties. I ought to have mentioned on the question of credibility, that a very material point of the contract, viz., that Mr. *Fisher* was to furnish the money, does not appear even in the answer, but comes out in Mr. *Fisher's* evidence. Mr. *Fisher*, who is a witness for the Defendant, and was not cross-examined, tells us what the contract really was. He says: "The Defendant told me that the total price

(1) Law Rep. 6 H. L. 202.

payable to the American company for the mine was £50,000; after giving some further consideration, I agreed to join the Defendant in buying the property. The agreement which we then came to was that the property should be purchased for £60,000; that I should provide that sum" (that is a fact not communicated to the Plaintiff, and in fact it is a fact kept out of the answer in which the Defendant was bound to state on oath all the material points of the contract), "but that the Defendant should at his cost and risk make a thorough examination of the property, and satisfy me as to its value, and that it was a *bonâ fide* affair, and should deposit £2000" (which he in fact subsequently did; that was not told to the Plaintiff, and that is rather against the bargain; it does, however, appear in the answer) "to cover the expense of such examination and also of the promoting any company which I might be able to organise for the purpose of buying and working the said property, and that the Defendant and myself should enter upon the adventure upon these terms, and should share equally any profit or loss in the transaction." That was not told to the Plaintiff, and the Defendant does not pretend he did tell him anything of the kind. He only told him he was to be one of the purchasers. Now, let us look what the bargain really was. Mr. *Fisher* was to find the purchase-money, £60,000, of which the Defendant would get his share, and the Plaintiff would get his share. But over and above that, subject to the Defendant giving some further information and making a deposit of £2000, the Defendant was to have half the further profits of floating the company; so that in fact, though his duty towards the Plaintiff was to make the best bargain he, the Defendant, could for the partnership, he deprived the Plaintiff of his share of the subsequent profits, and, oddly enough, they were the largest part of the transaction, for the agreement having been signed on the 28th of July, the company was registered on the 3rd of August; and on the 2nd of August an arrangement was made for the sale of this mine for £200,000, £150,000 in cash and £50,000 in shares. It is said, and probably with some truth, that if the company had not floated they never would have got the money. But I am afraid if the company had not floated the same observation might have been made as to the £60,000. It is by no means proved to my satisfaction that if *Fisher*

M. R. 1874 DUNNE v. ENGLISH.

or his friends had not come forward the money would have been forthcoming. However, I am not at liberty, nor do I intend, to speculate on that transaction. The bulk of the profits was the difference between £60,000 and £200;000. That that must have been in the Defendant's contemplation at the time is certain, because Mr. *Fisher* and he were to share equally in the profit of selling to a company. Whether the exact figures had been arranged between him and Mr. *Fisher* does not matter. As I have said before, the contract between the Plaintiff and Defendant was signed on the 28th of July, and this contract followed in a few days, namely, on the 2nd of August. Therefore it was a very close transaction. But the plain and clear duty of the Defendant, as agent of the partnership, was to secure the whole of the profits for the partnership; and many of the observations made in *Hichens* v. *Congreve* (1) apply to this case. It was the clearest and plainest breach of duty on the part of the Defendant that, when he was acting for the partnership, as he ought to have been, he should endeavour to obtain a private advantage for himself and conceal that from the Plaintiff as he did. I think I might leave the case there, but I must go a little further.

I do not think that the Defendant is liable merely on the abstract doctrine of equity under which Mr. *Coleman* was made liable in a very honest and *bonâ fide* transaction—I think the Defendant must have been perfectly well aware that he was taking an unfair advantage of the Plaintiff, that he intended to take that advantage, and that he, probably with a view to his own profit, kept the Plaintiff in the dark as to the real nature of the transaction. [His Honour then referred to the defence of acquiescence on the part of the Plaintiff, and continued:—] It appears to me, first of all, that any notion of acquiescence or release of right, that is, of gift by the Plaintiff to the Defendant of half the profits over and above the £10,000, is quite out of the question; that the Plaintiff never had any knowledge of his rights until after the filing of the bill; and that, even if he had any knowledge or something to put him on inquiry, he has done no act, and the Defendant has done no act with his knowledge or sanction, which alters the relations of the parties. Therefore I think there is no defence on this ground.

(1) 1 Russ. & My. 150, n.

M. R.
1874
DUNNE
v.
ENGLISH.

Under those circumstances I intend to make a decree substantially in accordance with the first and second paragraphs of the prayer of the bill.

July 30. Upon the account directed by the decree being proceeded with, the Defendant filed an affidavit which shewed that a considerable sum was coming to the Plaintiff.

Mr. *Southgate*, Q.C. (Mr. *Kekewich* with him), now moved that the Defendant might be ordered to pay the sum into Court.

Mr. *Chitty*, Q.C. (Mr. *Graham Hastings* with him), submitted that it was not in accordance with the practice of the Court to make such an order after decree and before the further consideration of the cause, citing *Binns* v. *Parr* (1).

The MASTER OF THE ROLLS, however, made the order.

The decree was appealed from, but terms of compromise were agreed to before the appeal was heard.

Solicitors: Messrs. *Waller & Handson;* Messrs. *Newman, Dale, & Stretton.*

Ex parte HARPER.

M. R.
1874
July 30.

Arbitration—Submission by Consent—Common Law Procedure Act (17 & 18 *Vict. c.* 125), *s.* 17—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 25.

The reference to arbitration of a question of disputed compensation pursuant to sect. 25 of the *Lands Clauses Consolidation Act*, is a "submission to arbitration by consent" within the meaning of the 17th section of the *Common Law Procedure Act*, and the submission may be made a rule of Court.

MR. *HARPER* claimed to be entitled to compensation from the *Great Eastern Railway Company* in respect of certain property which he alleged to be injuriously affected by works of the

(1) 7 Hare, 288.

M. R. 1874 *Ex parte* HARPER.

company in course of construction. The company disputed the claim; and on the 28th of January, 1874, *Harper* served on the company a notice in writing, requiring them to appoint one arbitrator on their behalf to assess the amount of compensation under sect. 25 of the *Lands Clauses Consolidation Act*, 1845. Pursuant to this notice, an arbitrator was appointed in writing by the company, and another was afterwards duly appointed in writing by Mr. *Harper*. These arbitrators afterwards appointed in writing an umpire.

It became necessary for the umpire to act, and he had accordingly acted, and given notice that he had made his award; but the company had not taken it up.

Mr. *Graham Hastings*, on behalf of Mr. *Harper*, now moved that the submission to arbitration contained in the notice of the 28th of January, 1874, and the subsequent written appointments of the arbitrators and umpire, might be made a rule of Court under sect. 17 of the *Common Law Procedure Act*, 1854.

Mr. *Smart*, for the company:—

The 17th section of the *Common Law Procedure Act* only applies where the submission to arbitration is by consent. This is not a submission by consent; the company were compelled to refer to arbitration by the provisions of the *Lands Clauses Consolidation Act*. The proper course would have been to apply for a mandamus directing the company to take up the award.

SIR G. JESSEL, M.R.:—

I think I can make the order. It appears to me that the words "by consent," in the 17th section of the Act, are used in contradistinction to a "compulsory reference" under the 3rd and following sections. What was meant was this—that where the reference took place under an order of Court, you must proceed in the Court which made the order; but in all other cases parties were to be at liberty to choose which Court they pleased.

The order was made accordingly.

Solicitors: Mr. *Broad*; Mr. *Shaw*.

ARMSTRONG *v.* ARMSTRONG.

M. R.
1874
July 31.

[1866 A. 109.]

Portions—Power to raise Portions by Mortgage—Costs of Mortgage.

A power in trustees to raise by mortgage a fixed sum implies a power to raise also the incidental costs of the mortgage.

UNDER a settlement dated the 20th of July, 1802, certain freehold estates were limited to trustees for a term of 300 years upon trusts for raising by sale or mortgage a sum of £6000, as portions for younger children. Under orders made in the suit, these portions had been raised by mortgage, and considerable costs had been incurred in so doing, principally by reason of its having been necessary to take out representation to the survivor of the original trustees of the term. A petition was presented, asking that these costs might be raised by mortgage of the same term, and now came on to be heard.

The settlement did not in terms authorize the raising of anything beyond the sum of £6000.

Mr. *Southgate*, Q.C., and Mr. *Cecil Russell*, for the Petitioners, referred to *Michell* v. *Michell* (1); *Parker* v. *Watkins* (2).

Mr. *Cozens-Hardy*, for the Reversioners, submitted that there was no power to raise these costs.

The MASTER OF THE ROLLS said that he considered it to be quite settled that trustees who had power to raise a certain sum by mortgage for the benefit of a particular person or class of persons had also, by implication, power to raise the incidental costs by mortgage of the same property; and he made the order.

Solicitors: Messrs. *Wadeson & Malleson.*

(1) 4 Beav. 549. (2) Joh. 133.

M. R. 1874 Aug. 1.

In re POOLE FIREBRICK AND BLUE CLAY COMPANY.

HARTLEY'S CASE.

Company—Issue of Fully Paid-up Shares—Non-Registration of Contract—Rectification of Register—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Where shares were allotted and accepted as fully paid up in pursuance of a contract which, through inadvertence, had not been registered in accordance with sect. 25 of the *Companies Act*, 1867, and upon discovery of the omission the directors removed the name of the allottee from the register, then filed the contract, and subsequently issued fresh shares to the allottee, and the company was subsequently wound up:—

Held, that although the directors had no power to cancel shares, they could rectify a mistake common to them and the allottee without applying to the Court of Chancery for an order directing them to do so; and, consequently, that the allottee could not be placed on the list of contributories in respect of those shares.

THE *Poole Firebrick and Blue Clay Company, Limited*, was registered under the *Companies Acts*, 1862 and 1867, on the 15th of December, 1870. The capital was £12,000, divided into 2400 shares of £5 each. On the previous 5th of December a contract in writing had been entered into between *Henry Boden* of the one part, and a trustee on behalf of the company (then intended to be formed) of the other part, whereby *Boden* agreed to sell certain property to the company then formed, in consideration of £6000, to be paid as to £1200 in cash, and as to the remaining £4800 in fully paid-up shares.

In January, 1871, *Boden* required the directors to allot to *George Hartley* 200 of the shares to which *Boden* was entitled under the agreement. Accordingly, on the 12th of January, 1871, a resolution was passed by the directors allotting 200 fully paid-up shares to *Hartley*, and certificates were subsequently issued to him, and his name was placed on the register of shareholders in respect thereof.

In June, 1871, it was discovered that the agreement of the 5th of December, 1870, had, through inadvertence, been omitted to be filed with the Registrar of Joint Stock Companies, pursuant to the *Companies Act*, 1867, s. 25. Upon this discovery being made the

directors, with the consent of *Hartley*, cancelled the 200 shares issued to him, and removed his name from the register, and he delivered up the certificates which had been given him. On the 13th of June, 1871, the agreement of the 5th of December, 1870, was duly filed; and subsequently the directors issued to *Hartley* 200 fully paid-up shares in lieu of those which had been cancelled.

The articles of association contained no power to cancel shares.

In December, 1873, the company passed resolutions for voluntary winding-up, and the liquidators placed *Hartley's* name on the list of contributories in respect of the 200 and other shares. He applied by summons to have his name removed in respect of the 200 shares; and the summons now came on to be heard.

Mr. *Cracknall*, for *Hartley*, submitted that if an application had been made to the Court, the directors would have been ordered to do exactly what they had done: *In re New Zealand Kapanga Gold Mining Company* (1); *In re Denton Colliery Company* (2); and that the directors might themselves do what the Court would have ordered to be done. [He was stopped.]

Mr. *Southgate*, Q.C. (Mr. *Chester* with him), for the liquidators:—

The directors had no power to cancel shares.

[The MASTER OF THE ROLLS:—It is not really a case of cancellation, it is simply a case of rectifying a common mistake.]

It has, no doubt, been held that where there is a *bonâ fide* question as to whether a person is a shareholder or not, the directors have power to compromise the dispute: *Lord Belhaven's Case* (3); but here there was no dispute. *Hartley's* name appeared on the register at a time when the agreement of the 5th of December, 1870, was not registered, as directed by the *Companies Act*, 1867, s. 25: and if he is now allowed to escape, creditors who inspected the register will be misled.

SIR G. JESSEL, M.R.:—

It is part of the duty of directors to keep a correct register of

(1) Law Rep. 18 Eq. 17, n. (2) Law Rep. 18 Eq. 16.
(3) 3 D. J. & S. 41.

M. R. 1874 HARTLEY'S CASE.

their shareholders. Here they allotted certain shares as fully paid up on the supposition that they had power to do so: the allottee accepted the shares on the same supposition. In fact, they had no power to make such an allotment. It was a case of common mistake; and some time after the allotment was made the mistake was discovered. If the parties had come to the Court, it is admitted that the Court would have ordered the company and its directors to do exactly what has been done. Then the only question is, Can it be necessary to come to the Court to get an order to do that which both parties are willing to do, and wish to be done? I cannot hold that it is necessary, and I am therefore of opinion that Mr. *Hartley* is in the same position as if his name had not been placed on the register until after the contract had been filed. His name must, consequently, be removed from the list of contributories.

Solicitors: Mr. *H. Wickens;* Messrs. *Miller & Miller.*

M. R. 1874 *Aug.* 5.

AYNSLEY *v.* GLOVER.

[1874 A. 81.]

Ancient Lights—Alteration of Easement—User of Building—Relief in Equity.

Where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights.

Heath v. *Bucknall* (1) is overruled by *Staight* v. *Burn* (2).

In considering the amount of injury caused to a Plaintiff by the obstruction of ancient lights the Court will have regard, not merely to the present, but also to the possible future use of the property.

Jackson v. *Duke of Newcastle* (3) is overruled by *Yates* v. *Jack* (4).

The circumstances under which a Court of Equity will give relief against obstruction of ancient lights by way of injunction, or by way of damages, and under which it will grant an interlocutory injunction, considered.

THIS was a motion to restrain the Defendant from obstructing certain lights in a building forming part of the *Heathcote Arms Inn*,

(1) Law Rep. 8 Eq. 1.
(2) Ibid. 5 Ch. 163.
(3) 3 D. J. & S. 275.
(4) Law Rep. 1 Ch. 295.

at *Longton*, in *Staffordshire*, of which the Plaintiffs were respectively owner and lessee.

The inn is situate on the east side of *Market Street*, in *Longton*; and at the back of it is a building which contains the windows in question, and is approached by and fronts to the south and abuts on a narrow path three feet wide. The front of the said building is a continuation of the south wall of the inn. The said building is used in connection with and forms part of the inn.

The windows, the obstruction of which was complained of, were, first, the window of a room on the first floor of the said building, described in the plan as the "smoke room," and said to be used as a smoking-room in connection with the inn: and secondly, two windows of a room on the ground floor, used as a cellar. The sill of the first-mentioned window was at the height of eleven feet from the ground, the sills of the two last-mentioned at the height of three feet.

The land on the south side of the path belonged to the Defendant, and, until recently, had no buildings on it, with the exception of a low wooden shed, which did not interfere with the access of light to the windows. The Defendant now proposed and had commenced to erect a building thirty-six feet high on this piece of land, and the present suit was instituted for the purpose of restraining the Defendant from erecting any building so as to obstruct the Plaintiffs' ancient lights.

It was a matter in dispute between the parties, whether the windows were ancient lights. The Court was of opinion that for the purposes of the motion it was established that they were in part ancient, but had been materially enlarged within a recent period.

Mr. *Southgate*, Q.C., and Mr. *Keary*, for the Plaintiffs, were stopped.

Mr. *Roxburgh*, Q.C., and Mr. *Cracknall*, for the Defendant:—

Even if the Plaintiffs' lights be ancient, which we deny, the Plaintiffs have debarred themselves from obtaining an injunction by enlarging the windows: *Heath* v. *Bucknall* (1).

No injury sufficient to entitle the Plaintiffs to an injunction is

(1) Law Rep. 8 Eq. 1.

M. R. 1874 AYNSLEY v. GLOVER.

proved. The windows in question are those of a smoking-room and a cellar. The present user of these rooms will not be interfered with by our building, and the Court cannot consider any future user: *Jackson* v. *Duke of Newcastle* (1). The Court will only give relief at the hearing in the shape of damages, and the ends of justice will be satisfied by our now giving an undertaking to pull down our building if the Court shall so direct, at the hearing.

SIR G. JESSEL, M.R.:—

Mr. *Southgate*, I will not trouble you further upon the present occasion, whatever may happen at the hearing.

It is very greatly to be lamented that the views of the various branches of the Court of Equity have differed so immensely upon this question of ancient lights. I wish to state my own views clearly, so that if they are wrong they can be corrected elsewhere, and if they are right they may serve as a guide for the future.

Now, first of all, this case is a simple one as regards the facts. The Defendant is about to build opposite some windows of the Plaintiffs—which for this purpose and at this moment, I will assume are ancient lights—a wall, at a distance of three feet, which will be thirty-six feet high; the sill of the most important of the windows in question being eleven feet above the ground. Of course it is obvious, and it has not been denied by counsel for the Defendant, that such a wall as that must seriously and materially impede the access of light to these windows; so that upon that point we are fortunately, in this case, not subject to any conflict of evidence or to any dispute whatever. It is, however, contended, on behalf of the Defendant, that the title of the Plaintiffs to these alleged ancient windows is not clearly proved. I think, however, it is sufficiently proved for the purpose of an interlocutory injunction; that is, I do not hold it to be so conclusively proved as that the Defendant may not be able to disprove it hereafter; but upon the present evidence it is proved to my mind, and, if no further evidence is adduced at the hearing I shall hold it proved at the hearing that the Plaintiffs have ancient lights, but altered, no doubt, as regards the material lights, in a very substantial manner.

The first question I have to decide is, whether by reason of

(1) 3 D. J. & S. 275. 10 Jur. N.S. 668

this alteration, the Plaintiffs are deprived of their right to an injunction.

Now, if the case of *Heath* v. *Bucknall* (1) was well decided, and there were no other case upon the subject, I should have great difficulty in holding that the Plaintiffs are not so deprived. The principle of that case I understand to be this: that where the Plaintiff has altered his ancient lights materially and in such a manner that the Defendant cannot obstruct the additional or new lights without, to some extent, obstructing the ancient lights, so that by reason of the alteration the Plaintiff must in time gain a right to the new or additional lights, similar to that which he enjoyed as regards the ancient lights, then a Court of Equity will not interfere at the instance of the Plaintiff to grant an injunction, which would in effect preserve not only the ancient lights but enable him to acquire a title to the new lights. But *Heath* v. *Bucknall* was, in that view of the case, overruled by Lord Justice *Giffard* in *Staight* v. *Burn* (2). The Lord Justice *Giffard*, speaking of *Heath* v. *Bucknall*, says this: "But if this case is supposed to lay down the proposition that a Plaintiff who, according to *Tapling* v. *Jones* (3), has clear legal rights, cannot come to this Court and get protection for those rights, I entirely demur to such a conclusion. If, for instance, there is a house with three ancient windows, and it is desirable to add at no great distance from those three ancient windows, two other windows, is it to be said that because those two other windows are to be placed in that position, the Plaintiff is not to come into Court to preserve what has been decided in *Tapling* v. *Jones* to be his clear legal right? Such a conclusion would not be either according to principle or to the course of this Court. I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this Court will interfere by injunction." That amounts, in my view, to a decision to this effect: that if, either by alteration of the windows themselves (that is, by adding new lights immediately adjoining), or by adding new lights in close proximity to the old windows, the Plaintiff has altered the access of

(1) Law Rep. 8 Eq. 1.
(2) Law Rep. 5 Ch. 163, 167.
(3) 11 H. L. C. 290.

M. R. 1874 AYNSLEY v. GLOVER.

light in respect of quantity, yet, according to the decision in *Tapling* v. *Jones* (1), he is still entitled to damages at law for any injury done to the ancient lights; and that, being so entitled, if his case is otherwise one in which a Court of Equity would grant an injunction, his title to that injunction is not affected by the circumstance either that he has added to the windows, that is, the ancient lights themselves, or that he has made new windows in close proximity to the ancient windows. Therefore, following the decision of the Lord Justice, which, indeed, I am bound to follow, and considering that the principle which he has enunciated is not reconcilable with the principle upon which I consider *Heath* v. *Bucknall* (2) to have been decided, I hold that the defence which has been urged upon me arising from the case of *Heath* v. *Bucknall*, cannot be sustained. That disposes of the first objection.

The next objection is one which does not, I think, arise upon the evidence as it stands, though it may arise hereafter. I have no distinct evidence before me as to the use to which the room marked "smoke room" on the plan has been put. It is said, however, that it is used as a smoking-room, and that if it is so used the injury to the light, great and material though it be, will not be such as to interfere with the comfort of those who use the room as a smoking-room. That may or may not be the case. As I said before, there is no distinct evidence upon the subject; but even if there were, I do not think it would make any difference. Here, again, we have a conflict of decision. There is no doubt that in the case of *Jackson* v. *Duke of Newcastle* (3) Lord *Westbury* decided upon an interlocutory application that if you did not interfere with the use of the room for the purpose for which it was then being used (that is, did not interfere materially,) no injunction ought to be granted by this Court, and that the Court could not look at any future use to which the room might be applied. If *Jackson* v. *Duke of Newcastle* were law, and if it were proved satisfactorily in this case that this room was used as a smoking-room, and that the comfort of those using it would not be materially interfered with, then I should not be able to grant an injunction. But I must express my decided opinion that *Jackson*

(1) 11 H. L. C. 290. (2) Law Rep. 8 Eq. 1.
(3) 3 D. J. & S. 275.

v. *Duke of Newcastle* (1) is not law. Of course I should have no right to say so if there had been no other decision of a Court of equal jurisdiction; but there is such decision. The decision of Lord *Cranworth* in *Yates* v. *Jack* (2), which is subsequent in point of date, is entirely in conflict with the decision of Lord *Westbury* in *Jackson* v. *Duke of Newcastle*. Lord *Cranworth* says this: "The right conferred or recognised by the statute 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me which it does not, that for the purpose of their present business a strong light is not necessary, and that the Plaintiffs will still have sufficient light remaining, I should not think the Defendant had established his defence unless he had shewn that for whatever purpose the Plaintiffs might wish to employ the light, there would be no material interference with it."

That, I think, is a correct statement of the law; and, indeed, if I thought otherwise, I should be bound to follow it, as being the later decision of a Lord Chancellor. I may mention, although it is not conclusive, that Lord *Hatherley*, when Vice-Chancellor, had occasion to consider the decisions both of *Jackson* v. *Duke of Newcastle* and of *Yates* v. *Jack*, and he not only adhered (as of course, being Vice-Chancellor, he was bound to adhere), but he expressed an opinion in favour of the view taken by Lord *Cranworth* in *Yates* v. *Jack*. If that authority needed to be strengthened in order to be binding upon me (which it does not) I might refer to the view expressed by Vice-Chancellor *Wood*.

I may mention that the very point of *Jackson* v. *Duke of Newcastle* is actually considered in *Coke's* Reports, in *Luttrell's Case* (3), and there are some remarks in it upon easements generally, and upon the mode of their destruction, which bear upon all these cases. The real point there was, whether fulling mills could be altered into grist mills so that they would retain the same rights: "It was resolved that the prescription did extend to these new grist mills; for it appears by the Register, and also by F. N. B., that if a man is to demand a grist mill, fulling mill, or any other

(1) 3 D. J. & S. 275. (2) Law Rep. 1 Ch. 295, 298.
(3) 4 Rep. 86 a, 87 a.

M. R. 1874 AYNSLEY v. GLOVER.

mill, the writ shall be general, *de uno molendino*, without any addition of grist or fulling. So that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to shew the quality or nature of the mill; and therefore if the Plaintiff had prescribed to have the said watercourse to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as it was before; and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody will build a mill before he is sure to have water; and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure, as is aforesaid. So if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself"—that means, the qualities of the rooms and not of the house itself—"and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed; and although he builds new chimneys or makes a new addition to his old house, by that he shall not lose his prescription; but he cannot employ or spend any of his estovers in the new chimneys or in the part newly added. The same law of conduits and water-pipes and the like. So if a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." It appears, therefore, that in *Coke's* time they took that view of the alteration of a room.

Now, in the case of *Dent* v. *Auction Mart Company*, Vice-Chancellor *Wood*, speaking of Lord *Cranworth's* judgment in *Yates* v. *Jack*, says this (1): "Further than that, he says (which, perhaps, if I may be allowed to say so, is going a little beyond what, as far as I am aware, any previous case has decided) that the Plaintiffs' right to an injunction does not depend on the obstruction

(1) Law Rep. 2 Eq. 238, 249.

being injurious to them in the trade for which they actually used the premises, but is 'an absolute indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used.' Now that observation certainly goes further than any case has gone since it was decided in *Martin* v. *Goble* (1) that property which had been used for a malt-house could not claim the same privilege as if it had been used for a dwelling-house. But the two authorities may be easily reconciled by saying that the Lord Chancellor's observations may apply to the user of a house as it stands for any purpose for which it may be used in that condition, not to the user of a house when its whole character has been changed and it has been rebuilt, leaving the old windows untouched, as in the malt-house case." So that, without referring to it, the Vice-Chancellor has taken the same view as was taken in *Coke's* Reports, that you may certainly alter the use of the rooms. "But the doctrine," he continues, "has an application to the case before me on the contested question of the sample-room. Although I think, upon the evidence, there is very little doubt that the room in Messrs. *Dent's* case has been occasionally used as a sample-room, the observations of the Lord Chancellor would apply to this—that if the Messrs. *Dent* were minded to use it as a sample-room, it is immaterial whether they have been so using it for the last several years or not." Therefore I think it must be settled, or considered settled, at all events, in a case where the reversioner is a party, that the mere change of use of a room will not deprive the party complaining of his right to the access of light; and conversely, that in considering the injury to the light, the Court is bound to consider that the room may be used for some other purpose than that for which it is used at the moment when the injunction is applied for.

The next point is a serious one. In what cases is the Court to grant an injunction at all? It has been argued before me that no case of irremediable damage has been shewn, and nothing for which pecuniary compensation will not be sufficient. That, of course, is a very important point. I have upon previous occasions followed, and I shall for the future, unless my decision upon this point is reversed by the Court of Appeal, follow the decision of Vice-Chancellor *Wood* in *Dent* v. *Auction Mart Company*.

(1) 1 Camp. 320.

M. R. 1874 AYNSLEY v. GLOVER.

It must not be forgotten that whatever observations fell from Lord *Eldon* in the case of *Attorney-General* v. *Nichol* (1), or from Lord *Westbury* in *Jackson* v. *Duke of Newcastle* (2), the settled law is now as laid down in *Back* v. *Stacey* (3), with the slight alteration (as the Vice-Chancellor *Wood* points out (4)) of the single word "or" for "and." With that alteration the law stands thus: "In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable *or* to prevent the Plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." That is necessary in order to get damages at law. Whether it was always so I am by no means sure. If that is necessary to get damages at law, those are the very circumstances which entitle the Plaintiff to an injunction in equity, subject to this, that the damages must be substantial, though one can hardly conceive a case in which, if the doctrine of *Back* v. *Stacey* is well-founded (and I believe it is), the tenant in possession would not get substantial damages. The only case in which I conceive there would be damages not substantial would be the case of a reversioner who would not sustain any immediate damage and who might bring an action to try the right. Then Vice-Chancellor *Wood* says (5): "Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord *Eldon* and by Lord *Westbury*) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this Court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any Act of Parliament for that purpose having been obtained."

It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule

(1) 16 Ves. 338, 343.
(2) 3 D. J. & S. 275. 10 Jur N S 688
(3) 2 Car. & P. 466.
(4) Law Rep. 2 Eq. 245. 12 Jur N S 448
(5) Law Rep. 2 Eq. 246. 12 Jur N S 449.

now is—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently—that wherever an action can be maintained at law and really substantial damages, or perhaps I should say considerable damages (for some people may say that £20 is substantial damages), can be recovered at law, there the injunction ought to follow in equity; generally, not universally, because I have something to add upon that subject. In this case I do not think that anybody would doubt the damages would be substantial. The obstruction would in fact destroy the use of the room altogether; it would so darken it that perhaps it might be used for a cellar, or a similar purpose where no light was required; but for ordinary purposes it would destroy the use of the room.

The next point urged by the Defendant was this: he said, "At all events, this being an interlocutory application, let me continue my building, and I will undertake to pull down if the Court shall so think fit." That is a very specious argument to address to the Court, but one must have regard to the effect of allowing such a proceeding. Supposing a Defendant erects a building at great cost, when he comes to the hearing he will say to this Court: "Compare the injury to me, in pulling down the building, with the injury to the Plaintiff in allowing the building to remain." Ought or ought not the Court to give weight to such a representation? I think upon this point the observations of Vice-Chancellor *Kindersley*, in the case of the *Curriers' Company* v. *Corbett* (1), are very important. The Vice-Chancellor says: "If the Defendants' buildings had not been completed, there would have been ground for interference by injunction; but as they have been completed, the question is, whether the Court ought to or would order the pulling down of the buildings, or give compensation in damages. The Defendants' new buildings are of considerable magnitude and importance, while the two houses of the Plaintiffs are comparatively of small value and importance; and it has been decided that in such a case the Court will not as a matter of course order the Defendant to pull down his new buildings, but will give to the party injured by the erection of those buildings compensation in damages. It appears to me that this is precisely one of such cases." Consequently the learned Vice-Chancellor considered that, the

(1) 2 Dr. & Sm. 355, 360.

M. R. 1874 AYNSLEY v. GLOVER.

buildings being erected, the comparative values of the Defendants' buildings and the Plaintiff's were sufficient to induce him to refrain from granting an injunction in a case where, if the buildings had not been erected, he would have granted the injunction. If that is so, and if those considerations are to weigh with the Court upon the question of damages or injunction, I ought not to allow the Defendant to proceed with his building, which will put him in such an advantageous position as regards the Plaintiffs when the case comes to a hearing.

I may mention that in this particular case I have an additional reason; the Defendant's plans were ready in last October, and the Plaintiffs gave him notice not to interfere with their lights; the Defendant chose, for some reason or other, to begin building only on the 18th of July of this year. Therefore, if he can wait from October till July before he commences to build, he can very well wait till November before he goes on with the building.

20 L.J. 497

There is only one other point remaining, and that is this: I was strongly urged by the Defendant to say that this was a case of injury of such a nature that the Court would at the hearing (I suppose that is what he meant), not grant an injunction, but give damages. It is necessary to consider the effect of the Act commonly called *Lord Cairns' Act* as to the jurisdiction of this Court. It appears to me that the second section of that Act gave a new power to the Court of Chancery. The words are these: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction." Now the first remark upon that is this: it only arises when the Court of Chancery has jurisdiction to grant an injunction. It can only apply to those cases in which the Court could have granted an injunction, at all events at the time of the filing of the bill; and if the Court could have granted an injunction it ought to have granted the injunction. Therefore it must apply to cases in which, before the passing of the Act, the Court would have granted an injunction; and it gives a new power to the Court purely discretionary—the words are, "if it shall think fit"—to substitute damages in some one or more of the cases in which,

before the passing of the Act, this Court would have granted an injunction. No doubt this power was only to be exercised at the hearing, and not upon interlocutory application; and it will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply. Although, in terms so wide and so long, it never could have been meant, and I do not suppose it will ever be held to mean, that in all cases the Court, of its own will and pleasure or at its own mere caprice, will substitute damages for an injunction. That cannot be; it must be for the Court to decide, upon consideration, to what cases the enactment should be held to apply. In the case of the *Curriers' Company* v. *Corbett* (1), we have an instance in which a Judge has said the Act ought to apply in some cases. I had one before me in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the Defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any Judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion, being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a Plaintiff who is enabled—I do not like to use the word "extort," but—to obtain a very large sum of money from a Defendant merely because the Plaintiff has a legal right to an injunction. I think the enactment was meant in some sense or another to prevent that course being successfully adopted. But there may be some other special cases to which the Act may be safely applied, and I do not intend to lay down any rule upon the subject. If I had found by the evidence that there was in this case a clear instance of very slight damage to the Plaintiffs—that is, some £20 or £30 or £40, but still very slight—and a very large, material, substantial damage to the Defendant, I should be disposed to hold that that was a case in which this Court would decline to interfere by injunction, having regard to the new power conferred upon me

(1) 2 Dr. & Sm. 355.

M. R. 1874 AYNSLEY v. GLOVER.

by *Lord Cairns' Act*, to substitute damages for it. As I do not, however, consider such a case proved now, whatever may happen at the hearing, I shall simply grant an injunction in the usual terms until the hearing or further order; and I will, upon the application of either party in or after November, advance the hearing of the cause.

Solicitors: Messrs. *Wedlake & Letts*, agents for Messrs. *Keary & Marshall, Stoke-upon-Trent;* Mr. *F. C. Greenfield.*

M. R. 1874 *June* 18.

MUMFORD *v.* STOHWASSER.

[1873 M. 137.]

Legal Estate—Protection against prior Equity—Notice—Trustee—Costs.

16 Ch. D. 494

Where money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has notice that his mortgagor has made himself a trustee for the owner of the prior equity. Whether he would be in any better position if he had no notice, *quære.*

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an under-lease to *M.*, who gave valuable consideration for the under-lease, and entered into possession. Subsequently the builder, without the knowledge of *M.*, obtained a lease of the house, and deposited it with the Defendant to secure an advance made without notice of *M.'s* title. After this the builder, as agent for the Plaintiff (who claimed under *M.'s* will), let the house to a tenant. Subsequently the builder granted to the Defendant a legal mortgage to secure the previous advance. The suit was instituted for specific performance of the agreement for an under-lease:—

Held, that the tenancy gave the Defendant constructive notice at the time of taking the legal mortgage that the builder was a trustee for *M.;* and that the legal estate was no protection to the Defendant against the prior equity; and a decree was made for specific performance, but, having regard to the negligence of *M.*, without costs.

IN 1868, *T. J. Barnett*, a builder, obtained from the president and scholars of *Magdalen College, Oxford*, an agreement for leases for terms of ninety-nine years, from the 29th of September, 1868, of certain plots of land at *Wandsworth.* The agreement provided

for building houses on the land, and contained the ordinary provisions for granting separate leases of the houses as they should be completed.

In the latter part of the same year, 1868, *Barnett* entered into a verbal agreement with *George Mumford*, whereby, in consideration of the sum of £575, he agreed to build a house on a portion of the land of the size and character specified in the agreement with *Magdalen College*, and on the college granting a lease thereof to grant a sub-lease of the same to the said *G. Mumford* for the said term of ninety-nine years from the 29th day of September, 1868, less the last ten days thereof, at the rent of £14 per annum, to commence on the 25th day of March, 1869. In accordance with the verbal agreement, a house called *Surrey Lodge* was built by *Barnett*. It was completed in March, 1869, and on its completion possession was given to *G. Mumford* by *Barnett*, and *Mumford* let the house to a tenant. The sum of £575 was paid by *Mumford* to *Barnett* by instalments; the payment of the last instalment was made on the 7th day of June, 1869. Subsequently additional sums for alterations and extras, amounting in all to the sum of £80 19*s.*, were paid by *G. Mumford* to *Barnett*.

On the 24th day of September, 1869, *G. Mumford* was dangerously ill, and the following memorandum of his verbal agreement was, by his request, reduced to writing, and signed by *Barnett*:—

"*Thomas John Barnett* has this 24th day of September, 1869, agreed to grant a lease of a piece of land, situate and being on *All Farthing Piece, Wandsworth*, to *George Mumford*, of No. 8, *Down Street, Piccadilly, St. George's, Hanover Square*, county of *Middlesex*, for a term of 99 years less 10 days, from Sept. 29th, 1868, ground rent to commence from March 25th, 1869, according to lease being drawn up by the solicitors of the estate, with plan annexed.

"*Thomas John Barnett.*

"Witness, *W. Mumford.*"

G. Mumford died on the 29th of September, 1869, having by his will, dated the 29th day of September, 1869, bequeathed all the "lease and goodwill" of the house to his wife for her life, and at her decease directed it to be equally divided between his son the Plaintiff *George Robert Mumford*, and his son the Plaintiff *Alfred*

M. R. 1874 MUMFORD v. STOHWASSER.

Samuel Mumford, absolutely; and having made other bequests, the testator devised and bequeathed all the residue of his property, real and personal, to the Plaintiffs, and appointed *George Foxal*, the said testator's said wife, and his son *William Mumford*, executors of his will, and the same was witnessed by, amongst other persons, the said wife of the said testator.

No notice was given to *Magdalen College* by *G. Mumford* of his agreement. On the 9th of December, 1869, the college granted to *Barnett* a lease of the house in accordance with the original agreement, at an apportioned rent of £13 per annum.

Barnett concealed from *Mumford's* legatees and representatives the fact that he had got the lease, and on the 23rd of May, 1871, borrowed from the Defendant *Stohwasser* £500, and deposited with him the lease of an adjoining house. In September, 1871, *Barnett* obtained from *Stohwasser* a further loan of £522, and then deposited with him the lease of *Surrey Lodge* as a security for the two sums of £500 and £522, concealing the fact of the agreement with *Mumford*. At that time, according to the view of the evidence taken by the Court, the tenant who had been in possession had gone away, and the house was shut up and vacant.

The letting of the house was intrusted by the Plaintiffs to *Barnett* (who was a house agent as well as a builder) as their agent, and the house was subsequently let by him again for them to a tenant named *Stammwitz;* he entered into possession in March, 1872, and had held possession ever since, and paid his rent up to and including that due at Michaelmas, 1872, to *Barnett* as the Plaintiffs' agent. The rents due at and after Christmas, 1872, were paid direct to the Plaintiffs.

On the 27th of December, 1872, *Barnett* assigned the legal term in *Surrey Lodge* to *Stohwasser* by way of mortgage to secure the sums of £500 and £522 previously advanced.

Barnett subsequently became bankrupt.

In June, 1873, the bill in this suit was filed by *G. R. Mumford* and *A. S. Mumford*, as legatees of *G. Mumford*, against *Stohwasser* and the trustee in the bankruptcy of *Barnett*, praying for a declaration that *Stohwasser* took the assignment of the 27th of December, 1872, subject to *Mumford's* agreement for a lease of the 24th of September, 1869; for specific performance of the agreement of

the 24th of September, 1869; for an injunction to restrain any action at law; and for general relief.

The cause now came on to be heard. It did not appear that *Stohwasser* had actual notice of *Mumford's* title until after the 27th of December, 1872.

Mr. *Southgate*, Q.C., and Mr. *T. L. Wilkinson*, for the Plaintiffs:—

The Defendant *Stohwasser* took the legal estate from *Barnett*, not at the time that he advanced his money, but subsequently. *Barnett* had, previously to any advance being made by *Stohwasser*, entered into an agreement for value to sell and convey the property to the predecessor in title of the Plaintiffs; and after entering into such an agreement, he could not, by conveying the legal estate, alter the equities which he had created. The Defendant, therefore, took the legal estate subject to the Plaintiffs' prior equity, whether at the time of the conveyance he had or had not notice that *Barnett* was in the position of a trustee: *Sharples* v. *Adams* (1); *Maxfield* v. *Burton* (2). But whether this be so or not, at the time when *Stohwasser* took the conveyance of the legal estate the Plaintiffs' tenant was in occupation of the property, and he had therefore constructive notice of the Plaintiffs' title, and, consequently, that *Barnett* was a trustee for the Plaintiffs. All the cases shew that the legal estate is no protection when it is taken by a person who has, at the time he takes it, notice, whether actual or constructive, that the person from whom he takes it is in the position of a trustee, and the person who conveys also knows (as of course he did know in the present case) that he is a trustee: *Carter* v. *Carter* (3); *Pilcher* v. *Rawlins* (4).

Mr. *Fry*, Q.C., and Mr. *D. C. Beale*, for the Defendants:—

It is clear that when *Stohwasser* advanced his money he had no notice of *Mumford's* claim; the house was untenanted, and there was nothing to shew that *Barnett* was not the owner. We contend further, on the evidence, that when the Defendant took the legal estate he had no notice, actual or constructive, of the claim of *Mumford*. But whether he had or had not such notice is imma-

(1) 32 Beav. 213.
(2) Law Rep. 17 Eq. 15.
(3) 3 K. & J. 617.
(4) Law Rep. 7 Ch. 259.

M. R. 1874 MUMFORD v. STOHWASSER.

terial. In order to make the case of *Sharples* v. *Adams* (1) apply (if it be law, which we do not admit), it must be shewn that *Barnett* was a trustee for *Mumford*. But, in fact, the bill shews that he was not; the agreement on which the bill is founded is the memorandum of the 24th of September, 1869, and that leaves out material terms, as, for example, the rent and the conditions of the lease; and there is no agreement alleged of which the Plaintiffs can have specific performance. Again, *Sharples* v. *Adams* was a case of an express trust, which there certainly was not here. In *Maxfield* v. *Burton* (2) there was constructive notice at the time of the equity arising. In addition to this, the conduct of *Mumford* has been so negligent as to disentitle him to relief in equity.

Mr. *Southgate*, in reply, on the question of costs.

SIR G. JESSEL, M.R.:—

I cannot say that I feel any doubt upon the law of the case now that we have got the facts, which are very few and very simple.

It appears that *Barnett*, a builder, in the year 1868, entered into an agreement with *Magdalen College, Oxford*, to build some houses on a piece of land at *Wandsworth*, and to take a lease from the college for ninety-nine years from the 29th of September, 1868. *Mumford* verbally agreed with *Barnett* to buy one of the plots of land and to take a sub-lease from *Barnett* of the house to be erected on that plot for a term ten days short of the ninety-nine years' term, at a rent of £14 a year. Nothing appears to have been said, on the occasion of that agreement being entered into, about the covenants; but, of course, the covenants would follow the original lease. Therefore that is a complete agreement; the term, the rent, and the covenants are all agreed to. Upon that *Barnett*, being a builder, builds a house for *Mumford* on the piece of land in question, and is paid for it. Thereupon *Mumford* takes possession and lets it to a tenant. It appears that *Mumford*, falling ill on the 24th of September, was minded to put the agreement into writing, but it was put into writing very badly. It says that "*Thomas John Barnett* has this 24th day of September, 1869, agreed to grant a lease of a piece of land situate," and so on,

(1) 32 Beav. 213. (2) Law Rep. 17 Eq. 15.

describing it, "for a term of 99 years less 10 days from September 29th, 1868, ground rent to commence from March 25th, 1869, according to lease being drawn up by the solicitors of the estate, with plan annexed." Singularly enough, the rent of £14 a year is left out of this memorandum, and therefore that alone would not constitute an agreement. The agreement must rest upon the verbal agreement, although the existence of that agreement is corroborated by the written document. The prayer of the bill has rather led to Mr. *Fry's* argument as to there being no valid agreement, because the bill asks for the specific performance of the agreement of the 24th of September, 1869, which is in itself imperfect. It does not give the rent, which has to be found out by other evidence, nor does it shew anywhere what was the lease that was being drawn up. Now, it is immaterial whether it was being drawn up or not, because the lease referred to as being drawn up by the solicitors to the estate was evidently the original lease granted by the college. Whether it was being drawn up, or to be drawn up, I have no doubt it was sufficiently referred to, and even without any reference to it, the under-lease would contain covenants similar to those in the original lease. So that I cannot see any uncertainty, more particularly seeing that the money had been paid and the man had entered into possession. Therefore I should hold that it was clear, as between *Mumford*, if he had been alive, and *Barnett*, if he had been the Defendant, that *Mumford* would have a right to say that *Barnett* was a trustee for him to the extent of the under-lease agreed to be granted by *Barnett*.

After this *Barnett* committed a fraud, for the transaction cannot be described in any other way. Concealing the fact that he had sold the house, and concealing the fact from *Mumford* that he had got the lease from the college, and therefore was bound to grant the under-lease, he deposited this lease, which was granted on the 9th of December, 1869, by the college, with *Stohwasser*, the Defendant, as a security for a loan. At that time the tenant, who had originally been let into possession, had gone away, and the house was shut up and vacant; and at that time, therefore, there were no means of finding out by inquiry from the tenant who was the owner of the house. Mr. *Stohwasser*, therefore, advanced his

M. R. 1874 MUMFORD v. STOHWASSER.

money, believing that he had a good title, and without any notice, actual or constructive, that he had a bad title. The lease was deposited with him, and the house was empty. Afterwards the house was let to the present tenant, who has been in possession certainly since March, 1872. He has paid his rent to the Plaintiffs through the agency of *Barnett*, and he was undoubtedly the Plaintiffs' tenant. On the 27th of December, 1872, *Barnett* assigned the legal estate to *Stohwasser;* but the mistake which *Stohwasser*, or his advisers, made was in not taking that assignment when he advanced his money. Then he might have been safe; but he delayed taking that assignment until December, 1872, and at that time the house was undoubtedly in the possession of the tenant of the Plaintiffs, and therefore he had constructive notice of this tenancy, and consequently notice of the Plaintiffs' title. It was his duty, upon taking the assignment, to inquire of the tenant of whom he held; not having done that, he got constructive notice that the person assigning to him was a trustee. In other words, he took an assignment of the legal estate from a person whom he knew to be a trustee for other persons. I take it to be clearly settled, from very ancient times, that such an assignment will not avail the person taking it to get rid of a prior equity. That is very old law.

There is a second point raised, on which I have a word to say, although I think it does not arise in this case. I mean the question what the effect would be if the Defendant had no notice of the trust. I say I do not think it is necessary to decide it, because I hold that he had notice. As to this second point, there has been a great conflict of opinion; my own opinion is, that even without notice he could not have acquired title; but, as I said before, there is probably no point on which there has been greater difference of opinion. I entirely subscribe to what Lord Justice *James* said, in the case of *Pilcher* v. *Rawlins* (1), as to the old cases, in which a trustee of a term to attend the inheritance was allowed to assign in such a manner as to give preference, being contrary to all principle. Those were really cases of constructive notice, because the person taking the assignment must have known that the person assigning was a trustee for some one. What Lord Justice *James*

(1) Law Rep. 7 Ch. 259.

says is this (1): "Those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance—those cases, I say, involve a principle which I have never been able to understand." The case on which I have just expressed my opinion is the converse one to that put by the Lord Justice. I do not mean the actual case now before me, because I hold that the mortgagee had notice; but supposing that I did not so hold, this would be the case of a trustee knowing that he was a trustee assigning over the legal estate to a person who did not know he was a trustee, that person having previously acquired an equitable interest; and I should hold, if that neat point came for decision, which I think it does not in this case, that the second equitable incumbrancer or the purchaser of the equity did not thereby gain any priority; in other words, that a person knowing that he is a trustee, cannot, without receiving value at the time, by committing a breach of trust, deprive his own *cestui que trust* of his rights. Here, however, the point I have to decide is whether a person with notice at the time he takes the legal estate that the person assigning it is a trustee of the estate can get priority. I think that has been long since settled. I will refer to two cases only. In the old case of *Saunders* v. *Dehew* (2), the Court said this: "Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he"—that is, the purchaser—"had notice of the trust. For by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." I think that states the law about as concisely as it can be stated. The exact point that I have to deal with came before Vice-Chancellor *Wigram* in the case of *Allen* v. *Knight* (3). That was a very singular case. It may be stated shortly in this way: There was a first mortgage, then a second mortgage, both equitable. Then the second mortgagee, who had no notice of the first, purchased the equity of redemption, and then got in the legal estate. At the time he got in the legal

(1) Law Rep. 7 Ch. 268. (2) 2 Vern. 271.
(3) 5 Hare, 272.

M. R. 1874 MUMFORD v. STOHWASSER.

estate he had notice of the first mortgage, although he had no notice at the time he was advancing his money on the second. The Vice-Chancellor held, that he could not, by getting in the legal estate, oust the first mortgagee, he having notice of the first equitable mortgage at the time he got in the legal estate. That was a mere contract as this is. He says (1): "The first question is, whether the conveyance of the legal estate by means of the surrender and the admittance thereunder, has altered the relative position of the parties. *Charles Allen* at that time filled different characters. He was trustee, under the will of *Harris*, of the £1050 stock; of the equitable mortgage for securing it, and of the legal estate by which the equitable mortgage was protected. He was, in addition to his character of mortgagor, bound by express contract with two of the trustees of *Harris*' will"—they were the persons entitled to the equitable mortgage—"The question is, Could the Defendants, the *Smiths*, either as purchasers for value or as second mortgagees, having notice of *Charles Allen's* obligations to his *cestuis que trust*, insist upon holding the legal estate as against those parties with notice of whose rights that estate was taken? I think they could not, and that they must hold the legal estate precisely as *Charles Allen* held it, for which the case of *Saunders* v. *Dehew* (2) is an authority, if authority were wanting. My opinion, therefore, is, that the change of the legal estate made no difference in the position of the parties." That is a distinct authority in favour of my decision in this case, and I must hold, therefore, that the Defendant *Stohwasser* is bound to execute a proper under-lease to the Plaintiff at the rent of £14 a year, and subject to proper covenants, having regard to the covenants in the original lease, and if there is any dispute that must be referred to Chambers.

As regards the costs, certainly anything more careless than the conduct of the late Mr. *Mumford* one cannot well imagine. He enters into a verbal agreement with a speculative builder, and when he takes a written agreement he does not take it in the proper form. Although he knew that a lease was soon to be granted, or ought to have been granted, he gives no notice to the college, nor makes any attempt to prevent that speculative builder getting possession of the lease. He, knowing from the nature of the case that the

(1) 5 Hare, 278. (2) 2 Vern. 271.

lease would be granted to him, takes no steps to prevent this man committing a fraud, and I might almost say tempts him (in one sense of the word) to commit a fraud by taking no step. On the other hand, the Defendant is in the unfortunate position of a person who chose to take an equitable mortgage. If persons do lend their money to speculative builders on deposit of leases, knowing, or being bound to know, that there may be some other equitable title created on the part of the persons depositing which may have priority over theirs, such persons so lending money must not complain, in the present state of the law, that they lose their security; but I do not think in a case of this kind, where two innocent parties have been defrauded, and where both have been guilty to some extent of negligence, that I ought to visit the person losing his money with costs. The decree will be that the Defendants grant a lease in accordance with the parol agreement.

Solicitors: Mr. *L. W. Gregory;* Messrs. *Pike & Son.*

V.-C. M. 1874 May 7.

LONDON FINANCIAL ASSOCIATION *v.* WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY COMPANY.

[1874 L. 56.]

Insolvent Railway Company—Suspense Period—Liabilities existing at Date of Arrangement—Substitution of Debenture Stock for Debentures.

7 H.L.Ca. 501.

An Act which was passed with a view to relieving a railway company from pressure by its creditors provided for the issue of several different classes of irredeemable debenture stock to judgment debtors and different classes of debenture holders in substitution for their existing securities, and another class of debenture stock for arrears of interest on debentures existing at the date of the passing of the Act, and thereby treated as being capitalised; and a suspense period was created within which no action or suit was allowed to be commenced without leave, except in respect of liabilities contracted after the passing of the Act, with certain specified exceptions:—

Held, that the debenture stock so issued was within the protection of the Act, and that the holders were not entitled without leave to institute a suit for the purpose of obtaining payment of interest in arrear.

THIS was a suit instituted by the *London Financial Association* on behalf of themselves and all other holders of B, C, and D debenture stocks of the Defendant company created under the powers of the *Wrexham, Mold, and Connah's Quay Railway (Arrangement) Act*, 1869.

The preamble of this Act recited an Act of 1862, by which the company was incorporated and authorized to raise a capital of £150,000 and to borrow on mortgage £50,000, and an Act of 1864, which gave authority to raise further capital and to borrow a corresponding amount, as well as several other Acts, containing further provisions for raising money and otherwise providing for carrying out the company's railway, and the creation of the capital and the borrowing of the money thereby authorized; and after stating difficulties which had arisen with the various creditors of the company and a suit in which judgment had been recovered, recited as follows:—

"And whereas holders of the company's mortgages to the extent of three-fourths in value or thereabouts of the entire mortgage debt of the company, and the holders of the preference shares

(1) 32 & 33 Vict. c. clii.

in the company to the extent of three-fourths of the entire preferential capital of the company, have assented, in writing, to this Act, and it is expedient that the mortgage debt of the company should be converted into debenture stock."

The Act provided by sect. 4 as follows:—

"Save as is hereinafter provided, from and after the passing of this Act, no actions, suits, executions, attachments, or other proceedings against the company or affecting the property thereof, except proceedings against the company as carriers of goods or passengers, or in respect of liabilities contracted after the passing of this Act, shall be continued or commenced during the period hereinafter defined and referred to as 'the suspense period,' unless with the leave of the Court, and upon such terms as the Court may impose: provided that the costs of any actions, suits, executions, attachments, or other proceedings against the company or affecting the property thereof, which shall be discontinued pursuant to this clause, shall be in the discretion of the Court, and, if allowed, shall be added to the debt."

Sect. 6 provided that the suspense period should be a period of ten years from the passing of the Act.

Sect. 21 provided for the creation of certain debenture stock to be called "A" debenture stock, part of which was to be placed in the name of the public officer of the *North and South Wales Bank*, in liquidation of a judgment which had been recovered against the Defendant company; and sect. 22 provided that the remainder of the A debenture stock should be applied first in purchasing certain rolling stock, and next in payment of moneys due to unpaid vendors of land, and next in paying off other charges.

Sect. 23 provided for the issue of B debenture stock, to rank in priority after the A debenture stock, which it stated was to be issued for the following purposes:—

"In substitution for equal amounts of the existing debentures issued under the authority of the Act of 1862, which shall, as soon as conveniently may be after the passing of this Act, be converted into and exchanged for debenture stock 'B,' and thereupon those debentures shall be cancelled."

V.-C. M.
1874
LONDON FINANCIAL ASSOCIATION v. WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO.

Sect. 24 provided for the creation of C debenture stock to rank in priority over the undertaking next after the B debenture stock, and to be issued for the following purposes:—

"In substitution for equal amounts of existing debentures issued under the authority of the Act of 1864, which shall, as soon as conveniently may be after the passing of this Act, be converted into and exchanged for debenture stock 'C,' and thereupon those debentures shall be cancelled."

Sect. 25 was as follows:—

"'D' debenture stock shall not exceed in amount the sum of one hundred thousand pounds, and shall bear yearly interest at the rate of five pounds per centum, and shall rank in priority over the undertaking next after 'C' debenture stock. 'D' debenture stock shall be issued at par in exchange for equal amounts of all interest now due and remaining unpaid on any mortgages, and of the general debts to any general creditor who shall discharge the same: provided that it shall be lawful for the board to state accounts, compromise and ascertain general debts, by arbitration or otherwise, with general creditors, and to issue 'D' debenture stock for the amounts so stated, compromised, or ascertained."

Sect. 28 provided that the income of the company should, subject to an agreement therein mentioned made with the *Buckley Railway Company*, be applied, first, in the payment of working and incidental expenses and of all rates and tithes and rent-charges under the *Lands Clauses Consolidation Act*, 1845, or the *Lands Clauses Consolidation Acts Amendment Act*, 1860; secondly, in payment, according to their classes and priorities, of current interest or dividend on all mortgages; and thirdly, subject to the rights of any general creditor, among the shareholders according to their rights and priorities.

The facts of the case were, that the Defendant company had borrowed on mortgage and debenture various large sums of money from the Plaintiffs and various other persons, amounting, in the year 1869, to £171,650, and that they were then indebted to the Plaintiff company in principal sums amounting to £6000 on mortgages or debentures under the Act of 1862, and in principal sums amounting to £6500 on mortgages or debentures under the Act of

1864; and there was also, at the beginning of the year 1869, a considerable sum due to the Plaintiffs for interest on their mortgages or debentures.

The Plaintiffs had, shortly after the passing of the *Arrangement Act*, exchanged the debentures they held under the Act of 1862 for an equal amount of B debenture stock, and the debentures they held under the Act of 1864 for an equal amount of C debenture stock, and they accepted a sum of £2188 16*s.* 11*d.* D debenture stock in satisfaction for a similar sum due to them on the 9th of August, 1869, for arrears of interest under their debentures.

The Defendant company had kept down the interest on the A debenture stock, but no interest had been paid on the B, C, or D debenture stocks, and when the bill was filed £2700 was due to the Plaintiffs in respect of such interest.

The bill alleged that the Defendant company had deviated from the provisions of the *Arrangement Act* in some particulars, and prayed for the usual accounts, and that the income might be applied in accordance with the *Arrangement Act* so far as not modified by a subsequent Act, and for a receiver of the tolls and income of the Defendant company's railways and undertaking, and a motion for a receiver was now accordingly made.

On the motion coming on, a preliminary objection was raised on behalf of the Defendant company that these debentures were given in respect of a liability existing at the date of the passing of the Act, and that the leave of the Court had not been obtained for the filing of the bill. This point was therefore argued first.

Mr. *Mackeson*, Q.C., and Mr. *Dryden*, for the Plaintiffs:—

The appointment of a receiver is the right of an unpaid debenture holder, *Fripp* v. *Chard Railway Company* (1), and the Court has never refused to appoint one under such circumstances as the present.

The preamble of the *Arrangement Act* shews that it was passed with the consent of the mortgagees or debenture holders, and that

(1) 11 Hare, 241.

V.-C. M. 1874 LONDON FINANCIAL ASSOCIATION v. WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO.

they gave up their rights against the company upon their debentures for the new debenture stock of the B and C descriptions. The new liability thus constituted was of a totally different kind from that which previously existed. The old debentures were legal mortgages of the ordinary kind, covering all the property of the company to secure the repayment of the principal at a given date, and the payment of interest in the meantime, and in lieu of them the creditors accepted this debenture stock. This kind of security is regulated by the 22nd section of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118). It is irredeemable, and consequently the principal can never be recovered, and by the other provisions of this Act the remedy for recovering the interest is by the appointment of a receiver. The old mortgage security is as completely gone as if it had never existed, and the new liability substituted for it. If this were the case of the A stock, the point would be beyond question. It was issued partly in satisfaction of the claims of judgment creditors, and the effect of the arrangement was that the judgments were completely discharged, and the company became subject to an entirely distinct liability. It would be absurd to say that the B and C stock, which stand behind the A stock, can be in a worse position, especially considering that the old debentures, in respect of which the B and C stock was issued, were expressly cancelled by the *Arrangement Act*. The creditors only assented to the arrangement on the terms of being allowed an immediate resort to their new remedy of the appointment of a receiver whenever the interest should fall into arrear. This point was decided in *Potteries, Shrewsbury, and North Wales Railway Company* v. *Minor* (1), where a debenture holder who had obtained judgment was held bound by a scheme of arrangement passed subsequently to his judgment.

As regards the D stock, it was issued in substitution for arrears of interest, which were capitalised for the purpose of the issue. The *Arrangement Act* was passed to protect the company from various classes of creditors who might have harassed them, as was attempted to be done in *Potteries, Shrewsbury, and North Wales Railway Company* v. *Minor*, but the interest on debenture

(1) Law Rep. 6 Ch. 621.

stock created after the passing of the Act can in no sense be considered as a liability existing at the date of the passing of the Act. The word "liability" is, beyond question, used in a limited sense, because the Act only related to mortgagees, the general creditors being left beyond its scope.

Mr. *Bristowe*, Q.C., and Mr. *T. A. Roberts*, for the Defendant company, were not called upon.

SIR R. MALINS, V.C.:—

It appears to me that the policy of this Act is like that of all other Arrangement Acts of the kind, to give the company, which is in a state of embarrassment and harassed with litigation, a period of repose; and the principle of the Act is that there is to be the usual suspense period of ten years, during which time no suit shall be brought against the company in respect of liabilities existing when the Act passed without the leave of the Court, but that when it appears that the company has in any way acted improperly, the Court may give leave to sue, and then everything will go on as if the suspense period had not existed at all.

Now, it is admitted that the Plaintiffs in this suit are suing in respect of principal and interest—principal which existed as a debt at the time, and interest which has accrued since the passing of the Act.

It seems that the liability is turned into perpetual debenture stock, which carries with it no right to the repayment of the principal of the debt. No advance has been made by the company since the Act passed. Whatever they are entitled to receive from the company is in respect of liabilities which existed previously. The mode of payment is alone varied.

The Plaintiffs became parties to the arrangement, and thereby they undertook not to take any proceedings against the company, without the leave of the Court, for ten years, in respect of the liabilities existing at the time of the Act. I consider that the result is, that they agreed to accept a new form of security in respect of the existing liabilities, and that they were parties to the arrangement as to enforcing the liability under the new security given for the old debt, and were not at liberty to take

V.-C. M. 1874

LONDON FINANCIAL ASSOCIATION v. WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO.

any proceedings against the company without the leave of the Court. I am by no means giving any opinion that this is a case in which the Court would not have given them relief, but I think I should be depriving the company of the protection thrown around them by the Act, and should be undoing the Act altogether, if I were to say that the holders of £10,000 worth of debentures were, under such circumstances, to be at liberty to sue without the leave of the Court. It seems to me that the principle of the case is covered by *Potteries and Shrewsbury Railway Company* v. *Minor* (1), to which Mr. *Mackeson* referred. There *Minor*, a debenture holder, obtained judgment against the company for principal, interest, and costs. After this the company filed a scheme of arrangement under the *Railway Companies Act*, 1867, which was assented to by the requisite majority of debenture holders, but not by *Minor*, and was duly confirmed and inrolled, and *Minor* having afterwards proceeded to issue execution on his judgment, it was held (affirming my decision), that although he had obtained judgment, he was still a debenture holder, and therefore bound by the scheme, and must be restrained from taking proceedings under his judgment. I remember in that case, although my judgment does not seem to have been reported, that I put it upon the ground that a mortgagee who has obtained judgment is still a mortgagee. He is a creditor who has a particular form of security, but that does not prevent him being a creditor at the time the Act passed. I am very sorry, inasmuch as the bill has been filed, that it was irregularly filed, and without the leave of the Court, but I cannot hear the motion. It will, therefore, be refused with costs, not including, however, the costs of the affidavits which have been filed.

Solicitors: Messrs. *S. F. & H. Noyes;* Messrs. *Helder & Roberts.*

(1) Law Rep. 6 Ch. 621.

In re HOGHTON.
HOGHTON *v.* FIDDEY.

V.-C. M.
1874
July 10.

[1867 H. 249.]

Practice—Bill of Review—Infant Petitioner—Affidavit of recent Discovery of Facts.

An infant petitioning for leave to file a bill of review will not be required to give evidence that the knowledge of the facts relied upon could not have been previously obtained by reasonable diligence:—

Quære, whether an infant requires the leave of the Court to file such a bill.

THIS was a Petition asking for liberty to file a bill or supplemental bill in the nature of a bill of review.

The Petitioner, *Frances de Hoghton*, was an infant, and appeared by *Richard de Hoghton* as next friend. She was one of the children of the late *Harriett Sarah*, Dowager Lady *De Hoghton*, who, by her will, dated the 16th of August, 1862, gave her personal estate to three trustees, whom she also appointed executors, and two only of whom, viz., Colonel *John Ireland Blackburn* and *Charles Fiddey*, proved the will, and accepted the trusts. The trusts of the will were, to sell and convert into money the whole of her estate, and invest in Parliamentary Stocks or Funds of *Great Britain*, or Government Securities, or mortgages upon real or long leasehold estates, and to hold the same upon certain trusts for the benefit of her children. On the 25th of September, 1866, she made a codicil to her will by which she devised and bequeathed any legal estates vested in her as mortgagee and trustee to *Charles Fiddey* alone.

Lady *De Hoghton* died on the 10th of December, 1866, and her estate was, for the purpose of obtaining probate, sworn under £50,000. She left ten children living at her death, most of whom were then infants.

On the 24th of October, 1867, a bill was filed in the name of the infant children by one *Frederick Francis Errever*, as next friend, against the executors, Mr. *Fiddey*, and Colonel *Blackburn*, and *Thomas de Hoghton*, one of Lady *Hoghton's* children, who was then of age, and out of the jurisdiction of the Court, charging

V.-C. M. 1874 *In re* HOGHTON. HOGHTON *v.* FIDDEY.

Fiddey with having misapplied the assets of the testatrix which had come into his hands, and seeking to have the estate administered by the Court.

Colonel *Blackburn* then, on the advice of his solicitors, concurred in the institution of an administration suit by summons on behalf of the infant children, against himself and Mr. *Fiddey;* and in an application to the Court on which, in December, 1867, an order was obtained staying all further proceedings in the first suit, as not being for the benefit of the infants. On the 18th of December, 1867, the usual administration decree was made on the summons. This order was never carried into Chambers, and no further step was taken in the suit.

Fiddey was a practising solicitor, and Colonel *Blackburn* and the *De Hoghton* family had full confidence in him, and left the management of their affairs entirely in his hands. The order staying proceedings in the first suit was obtained upon an affidavit by the solicitors that they had received from *Fiddey* full and satisfactory accounts and explanations as to the testatrix's estate, and that they had investigated them, and found that, with the exception of a sum of £900, representing a mortgage which had just been paid off, the estate was duly invested, partly in consols and partly upon mortgage security of ample value.

Fiddey died on the 4th of September, 1872. The Petition alleged that inquiries were then made in reference to the trust funds and securities belonging to the estate of the testatrix, and subject to her will, and that it was then for the first time discovered that at some time or other, but whether before or after the date of the order of the 18th of December, 1867, had not been ascertained, *Fiddey* was allowed by Colonel *Blackburn* to obtain the sole possession and control of the several securities on which the testatrix's estate was invested, and that such securities were not now forthcoming, but had been misapplied by *Fiddey*, and, with the exception of a mortgage security for £21,000, had been applied by him to his own use.

Fiddey had died, leaving liabilities far exceeding his assets, and it was now desired to carry on the administration suits with a view to making Colonel *Blackburn* liable for the losses occasioned by the default of his co-executor and co-trustee.

The Petitioner prayed that she might be at liberty to exhibit a bill or supplemental bill in the nature of a bill of review, with respect to the matters stated in the Petition touching the estate and effects of the testatrix and the management and disposition thereof and otherwise relating thereto, and for relief in respect thereof as she might be advised.

The Petition was supported by an affidavit of the Petitioner's solicitor echoing it from information and belief.

Mr. *Glasse*, Q.C., and Mr. *Ingle Joyce*, for the Petitioner:—

Probably the necessary bill might have been filed without previously asking the leave of the Court, but the Petitioner desires to be free to add to the decree if necessary without running the risk of having to meet an objection that the leave of the Court was required. Assuming the Petition to be necessary, a *primâ facie* case for making the order asked for has been made out, and that is all that is required: *Partington* v. *Reynolds* (1).

Mr. *Cotton*, Q.C., and Mr. *Leonard Field*, for Colonel *Blackburn*:—

The Petitioner may either file this bill without the leave of the Court, in which case it is unnecessary and no order ought to be made, or, if it is necessary, the Court must be satisfied that the facts on which the Petition is based have come to the knowledge of the applicant and his agent for the first time since the period when he could have made use of it in the suit: *Daniell's* Chancery Practice (2). The infant ought, in fact, to appear by the same next friend as in the suit, and he ought to make the necessary affidavit. The fact is that all parties, including Lady *De Hoghton*, trusted *Fiddey*, and there are no facts which could not have been discovered at the time if any reasonable diligence had been used. An affidavit upon information and belief merely will not support the Petition: *Thomas* v. *Rawlings* (3).

Mr. *Torriano* appeared for the executors of *Fiddey*.

(1) 4 Jur. (N.S.) 200; 6 W. R. 615. (2) 5th Ed. p. 1423.
(3) 34 Beav. 50. 10 Jur. N.S. 1192.

V.-C. M. 1874 *In re* HOGHTON. HOGHTON *v.* FIDDEY.

SIR R. MALINS, V.C., after stating the facts, continued :—

The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience. It is said that there is no occasion for this application, because she is at liberty to file a bill without leave. I am by no means satisfied that the bill might not have been filed without the leave of the Court; because the case is that of a next friend having taken a common administration decree at a time when there was no reason to suspect that anything more could be required, and having grossly and inexcusably neglected his duty in not even having carried the decree so obtained into Chambers. It may be that if the decree had been duly prosecuted this misfortune might not have fallen on any of the parties. Mr. *Fiddey* might have found the money he had misapplied at the expense of some other person, or at that time he may not have incurred the losses which led to the subsequent disastrous state of his affairs. However that may be, the proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and will protect her interests.

On the question whether there are any facts which only became known on the death of Mr. *Fiddey*, and are such as entitle the Plaintiff to review the previous orders, I am satisfied upon the whole that by no reasonable diligence could the facts relied on by the Petitioner have been discovered in 1867, but if it was possible to discover them, the discovery ought to have been made by Colonel *Blackburn* himself.

The first question is, whether this infant is entitled to file a bill. It is perfectly clear to my mind she must have that right. She happens to be one of a large family, but she has sufficient interest in her mother's estate to entitle her to maintain a suit against the trustee. This being so, the only remaining question is whether it is necessary for the Petitioner to apply for leave to file the bill. Possibly it may not be necessary; but, on the other hand, it may

be requisite to add an inquiry to the decree in the suit, and it may be more proper that there should be the leave of the Court to make that addition. Therefore, I cannot say I am by any means satisfied that it was not necessary to apply to this Court, but whether necessary or not, I think it was quite proper.

Then with regard to the affidavit, Mr. *Field* cited *Thomas* v. *Rawlings* (1), in which leave to file a bill of this kind without the usual affidavit that the mistake could not have been earlier discovered by reasonable diligence was refused to a person *sui juris*. But that case has no application to an infant of tender years who can be guilty of no negligence, and cannot be answerable for the negligence of her next friend; and Mr. *Field* has not been able to find a case where the principle has been applied to an infant, because it never has been so applied. Negligence cannot be imputed to an infant for not discovering facts, for an infant is not bound to discover any thing, and therefore no affidavit of reasonable diligence can be required. This infant Petitioner has a right to investigate the case, and I am of opinion upon the whole that it is a prudent and proper course to come to this Court before filing a supplemental bill in the nature of a bill of review. The leave must therefore be given.

If the application had been acceded to by Colonel *Blackburn*, I think the proper course would have been to make the expenses of the Petition costs in the cause in which the administration decree has already been made. I think the Petitioner's costs ought to be costs in that cause, and that Colonel *Blackburn* should be allowed such costs as would have been incurred if he had not opposed this Petition, but had acceded to its prayer.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *Field, Roscoe, & Co.;* Messrs. *Pitman & Lane.*

(1) 34 Beav. 50. 10 Jur. NS 1192.

V.-C. M.

1874

June 24;
July 11.

SCOTT *v.* CUMBERLAND.

[1867 S. 118.]

Administration Suit—Costs—Undisposed of Real Estate—Lapsed Share.

The rule that in providing for the costs of an administration suit real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of, applies equally to real estate which descends by reason of lapse and to that as to which no disposition has been attempted.

Maddison v. *Pye* (1) questioned.

THIS was a suit for the administration of the estate of one *Walter Scott*, who by his will dated the 19th of September, 1840, directed that his residuary estate, which consisted both of realty and personalty, should after the death of his wife be divided into three equal parts, and that one of such parts should be paid to such of the children of his late brother, *John Scott*, as should be living at the death of his wife, and another of such parts should be paid to such of the children of his sister *Agnes* as should be living at his death, and the remaining part to such of the children of his late wife's brother, *Hugh Ellis*, as should be living at his said wife's decease.

The testator died on the 16th of December, 1843, leaving his widow surviving him, and she died in the year 1864. There were then living no children of the testator's sister *Agnes*, or of *Hugh Ellis*, and consequently the shares of residue given to such children lapsed and devolved as to the personalty on the testator's next of kin, and as to realty on his heir-at-law.

The suit was instituted by one of the children of the testator's brother, *John Scott*, and was heard on further consideration on the 8th of May, 1874.

The testator's residuary estate consisted partly of real and partly of personal estate, but the amount of the lapsed shares of personalty was found to be insufficient for payment of the costs of the suit. The minutes of the order on further consideration, as prepared by the Plaintiff, accordingly provided for applying the

(1) 32 Beav. 658.

shares of the real estate which had lapsed in payment of the residue of these costs, in priority to the personal estate effectually disposed of by the will. After some discussion an order was made according to the minutes, but on drawing up the order the question how the costs were to be borne was raised by the heir-at-law.

The cause was accordingly set down to be spoken to upon the minutes, in order that the point might be re-argued.

Mr. *J. Pearson*, Q.C., and Mr. *Angelo Lewis*, for the heir-at-law:—

The rule that the costs of an administration suit are payable out of real estate undisposed of in priority to personal estate passing under the will applies only where no attempt has been made by the testator in the cause to dispose of such real estate. Where it becomes undisposed of by the failure of an attempted disposition, the heir-at-law does not bear more than a rateable proportion of the costs: *Eyre* v. *Marsden* (1). That was a decision of Lord *Cottenham* based upon a previous decision in *Skrymsher* v. *Northcote* (2). The same rule was applied in *Maddison* v. *Pye* (3), and in *Burt* v. *Sturt* (4), and the only authority seemingly opposed to it is *Row* v. *Row* (5), which being only decided by a Vice-Chancellor, cannot be considered as overruling Lord *Cottenham*, especially as it does not appear that *Eyre* v. *Marsden* was cited before the Vice-Chancellor: *Oddie* v. *Brown* (6).

Mr. *Glasse*, Q.C., and Mr. *Langworthy*, for the executors of the last surviving executor of the testator:—

This case differs entirely from *Eyre* v. *Marsden*. The principle on which it depends is clearly laid down in *Stead* v. *Hardaker* (7), where the question was how debts were to be borne as between descended and specifically devised real estate, and it was treated as a settled rule that, in the absence of any express direction to the contrary, the descended estates were to be applied in priority

(1) 4 My. & Cr. 231.
(2) 1 Sw. 566.
(3) 32 Beav. 658.
(4) 10 Hare, 415.
(5) Law Rep. 7 Eq. 414.
(6) 4 De G. & J. 179.
(7) Law Rep. 15 Eq. 175.

V.-C. M. 1874 SCOTT v. CUMBERLAND.

to those which were disposed of. The rule as to the costs of an administration suit is exactly the same. A different rule of administration may be applied by the testator, as was the case in *Eyre* v. *Marsden* (1), where there was a specific charge of costs and charges attending the execution of the will. But that case is no authority where the will is silent as to the costs of a suit. A mere charge of testamentary expenses would not carry the costs of an administration suit: *Browne* v. *Groombridge* (2). *Maddison* v. *Pye* (3) might very well not have been reported. In a case which especially turns upon the expressions of the will there is no case cited, the provisions of the will are not stated, and no counsel are mentioned as having appeared. It cannot be treated as an authority for the general proposition set up by the heir-at-law. In *Eyre* v. *Marsden* the words charging the costs are just as strong as those charging the just debts, funeral and testamentary expenses, in *Stead* v. *Hardaker* (4). *Row* v. *Row* (5) is the latest case on the question, and is clearly in point.

Mr. *Caldecott* (Mr. *Cotton*, Q.C., with him), for the Plaintiff, supported the same view.

Mr. *Pearson*, in reply:—

In *Eyre* v. *Marsden* it is true that, as in *Stead* v. *Hardaker*, the testator had given directions as to the payment of debts or costs out of a particular fund, and those directions had to be followed. But in *Eyre* v. *Marsden* the question was also considered upon principle, and Lord *Cottenham* (6) distinctly laid down that where a devise of real estate lapses it is not property undisposed of, so as to be required to bear the costs in preference to property effectually disposed of under the will, and he expressly followed the order as to costs which the Registrar's book shewed had been made in *Ackroyd* v. *Smithson* (7); and *Eyre* v. *Marsden* has been continuously treated as laying down this rule, as appears from *Elborne* v. *Goode* (8), *Bagot* v. *Legge* (9), and in *Burt* v.

(1) 4 My. & Cr. 231.
(2) 4 Madd. 495.
(3) 32 Beav. 658.
(4) Law Rep. 15 Eq. 175.
(5) Law Rep. 7 Eq. 414.
(6) 4 My. & Cr. 245.
(7) 1 Bro. C. C. 503.
(8) 14 Sim. 165.
(9) 2 Dr. & Sm. 259. 10 Jur. N.S. 1092

Sturt (1), where the failure of disposition arose from exactly the same cause as in *Eyre* v. *Marsden* (2); but there were no words tending to throw the costs upon any particular fund. The same rule is also laid down in *Daniell's* Chancery Practice (3).

July 11. SIR R. MALINS, V.C. :—

This is an ordinary administration suit, and on the hearing on further consideration on the 27th of May last I made a declaration that certain shares of the produce of the real estate of the testator, *Walter Scott*, which, in the events that had happened, had become undisposed of, and consequently descended to the heir-at-law, were the primary fund for the payment of the debts of the testator and the costs of the suit. Mr. *Pearson* having suggested a doubt as to the correctness of this view of the case, the point was re-argued on the 24th of June last. Mr. *Pearson*, in his argument on that occasion, did not dispute the rule established by Lord *Hardwicke* in *Galton* v. *Hancock* (4), which, it will be remembered, was well considered by him, because the report states that after considering it for a whole year he entirely changed his opinion, and reversing every part of his former decree, decided that a descended estate must exonerate a specifically devised estate from the debts of the testator, and the costs of the suit. Mr. *Pearson*, however, contended that the rule applied only to an estate, or the share of an estate which was left undisposed of by the will, and not to one which became so by events happening after the execution of the will; as, for instance, by lapse in consequence of the death of the devisee in the lifetime of the testator. In support of this view he mainly relied on the judgment of Lord *Cottenham* in *Eyre* v. *Marsden*. In that case the testator began his will by directing that all his just debts and funeral and testamentary expenses should be paid by his trustees and executors therein named, out of his real and personal estate. Everything, therefore, was charged, and that was the state of facts with which Lord *Cottenham* had to deal, and it is evident from the judgment that his expressions were regulated by

(1) 10 Hare, 415, 428. 17 Jun 74
(2) 4 My. & Cr. 231.
(3) 5th Ed. p. 1294.
(4) 2 Atk. 430.

V.-C. M. 1874 SCOTT v. CUMBERLAND.

that consideration. For he says (1), "It is, however, expedient to see what the testator has directed upon this subject. He, in the first place, directs the payment of his testamentary expenses out of his real and personal estate; and after having devised and bequeathed all his real and personal estate to his trustees, he declares the trusts to be that they shall at any time or times after his death sell and convert into money all his real and personal estate, and invest the proceeds, after payment of his debts, funeral and testamentary expenses, and the costs and charges attending the execution of his will"—which, of course, includes the costs of the suit—"and then, after directing the payment of the annuities to his three children, he directs that the surplus of the annual income of his estate and effects shall be applied in accumulation of the capital of his property for the benefit of his grandchildren, and after the death of the survivor of his children, the annuitants, he directs his trustees to sell and convert into money all such parts of his estate and effects as shall not consist of money, and call in the money placed out upon security as aforesaid, and divide the same, after deducting the expenses of performing that his will and the legacies thereinafter mentioned, amongst his grandchildren." Then occur the expressions which give some semblance of support to the argument of Mr. *Pearson*. He cites a number of cases, and he says (2), "These cases seem to negative the proposition contended for by the Respondents, and to establish, on the contrary, that where an intestacy as to part of the personal estate arises from the intention of the testator being defeated by the happening of some event or the operation of law, the part so falling to the next of kin shall, in his hands, be subject to the same liability as to costs, and to no more than it would have been subject to if the gift had taken effect. And if that be so in other cases, why should it not be so in cases of partial intestacy arising from the operation of the Act against accumulation? Why should a rule as to costs be adopted in cases within the 39 & 40 Geo. 3, c. 98, different from that which has been adopted in cases within the 9 Geo. 2, c. 36. By the latter statute dispositions inconsistent with its provisions are declared to be absolutely, and to all intents and purposes, null and void. By the former

(1) 4 My. & Cr. 241. (2) 4 My. & Cr. 245.

directions for prohibited accumulation are declared to be null and void; and it is enacted that the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Then he says, that the lapsed shares are to bear only the proportion which they would have borne if they had not lapsed, but had gone to the legatee because everything was charged originally.

This decision evidently proceeded on the ground of the charge of debts and costs contained in the will. The rule that descended estates must exonerate devised estates from the payment of debts and costs had been so long the established rule of the Court that it is impossible to suppose that Lord *Cottenham* would not have plainly expressed his intention to reverse that rule if he thought he was doing so. He was well aware of the rule laid down by Lord *Thurlow* in *Davies* v. *Topp* (1), by Lord *Alvanley* in *Manning* v. *Spooner* (2), and by so many other Judges, and he certainly would have expressed his dissent from those decisions, and in terms reversed them, if it had been his intention to do so. I mention *Davis* v. *Topp* as shewing the well-known rule as to the order of the application of the assets; first, general personal estate; secondly, estates devised for payment of debts; thirdly, descended estates; and, fourthly and lastly, specifically devised estates. The truth is, that Lord *Cottenham's* decision proceeded entirely on the language of the particular will he had under consideration, and so did the decisions in the cases which Mr. *Pearson* relied on as having followed it. Those cases were *Elborne* v. *Goode* (3), *Burt* v. *Sturt* (4), and *Oddie* v. *Brown* (5). The last was much relied on as being a decision of the Court of Appeal; but, in fact, there was no real estate whatever disposed of in it, and it has no application to the present case. *Bagot* v. *Legge* (6), a decision of Sir *R. Kindersley's*, was also referred to. But he evidently did not intend to infringe on the general rule, and, in point of fact, it was

(1) 1 Bro. C. C. 524.
(2) 3 Ves. 114.
(3) 14 Sim. 165.
(4) 10 Hare, 415.
(5) 4 De G. & J. 179.
(6) 2 Dr. & Sm. 259.

V.-C. M. 1874 SCOTT v. CUMBERLAND.

not a mere administration suit, and there were questions between the devisees *inter se*, and between devisees and the heir-at-law, which would not have arisen in an ordinary administration suit; and the Vice-Chancellor expressly says (1), "It appears to me that the principle of the costs being first payable out of the personal estate, and then out of the descended estates, does not apply in such a case as this, in which, in point of fact, the questions are entirely questions relating to the rights of the devisees *inter se*, and to the rights of the devisees and heir-at-law." There is not one word from Sir *R. Kindersley* to shew that he intended to act contrary to the well-established rule. The rule laid down by Lord *Romilly* in *Maddison* v. *Pye* (2) was also relied upon. Now, with regard to that case, I must say that I think it is a pity that cases which are to be reported at all should be reported as that was. The particular form of the will is not given, and there are no arguments, or even the name of the counsel engaged, and not a single authority is stated to have been cited. There is nothing to shew whether the estate was charged with debts or legacies. Somebody must have told Mr. *Beavan* that such a case had occurred when he himself was not in Court. The rule is thus laid down, and evidently incorrectly (3). "*Eyre* v. *Marsden* settles this: Where a real estate is disposed of in favour of several persons, and the suit is solely for the administration of the real estate, and some of the shares lapse, these shares are not to be made to bear the costs of the suit, but the costs are to be borne by the real estate"—which was not done in *Eyre* v. *Marsden*—"generally, and the heir-at-law's estate is not to bear all the costs." Further on the Master of the Rolls says, "I have always understood the rule to be this: in suits for the administration of the personal estate the part of it undisposed of is first applicable to the payment of the costs; but the rule is different as to real estate. There the heir-at-law is only charged with his proportion of the costs of the suit."

The rule as thus laid down is entirely erroneous, and I cannot believe that the Master of the Rolls ever stated it in those broad

(1) 2 Dr. & Sm. 262. 10 L. 1093 (2) 32 Beav. 658.
(3) 32 Beav. 659.

terms, and if he did, I can only say it is impossible that I can follow it. Then the decision of Vice-Chancellor *James*, in *Row* v. *Row* (1) was referred to by Mr. *Glasse* and Mr. *Langworthy*. With regard to that decision, although, as far as it goes, it is in accordance with the old rule, yet I think it can hardly be relied on as an authority, because I find the Vice-Chancellor expressing himself thus (2): "Here the whole estate is vested in the trustees, and the costs of suit are costs incurred in the execution of the trusts. It is, therefore, in the power of the Court to make an order throwing the costs on the undisposed of part of the trust estate, which it might not feel itself at liberty to make if the heir-at-law were here with clear legal estate in property descended to him." Therefore the Vice-Chancellor based his decision on the fact that the legal estate was not in the heir-at-law. I do not rely upon that case as a positive decision, although, as far as it goes, it shews his concurrence in the general rule. But in that case, a case of *Morley* v. *Tunstall*, also before the Master of the Rolls, was referred to, in which the decree was exactly contrary to the rule supposed to have been laid down by him in *Maddison* v. *Pye*. This was in 1859, and the Master of the Rolls there acted exactly upon the rule of *Davies* v. *Topp* (3). First he made the general personal estate undisposed of bear the costs, and then the descended real estate in exoneration of devised estate. I had occasion to consider that case in *Stead* v. *Hardaker* (4), where I believe I correctly laid down the law. In that case the testator began by charging all his real and personal estate in the most general manner with the payment of his debts and funeral and testamentary expenses, and it was argued that the descended estate was still the primary fund for payment of the debts. But I decided that the descended shares only bore the share of the debts which they would have borne if instead of descending they had remained in the hands of the devisee, and in giving judgment I used these expressions (5): "There is no doubt whatever that the general principle is that the descended real estate must bear the debts in priority to the specifically devised estate, but here the

(1) Law Rep. 7 Eq. 414.
(2) Ibid. 417.
(3) 1 Bro. C. C. 524.
(4) Law Rep. 15 Eq. 175.
(5) Law Rep. 15 Eq. 177.

V.-C. M. 1874 SCOTT v. CUMBERLAND.

testator begins by giving all and every part of his real and personal property to be disposed of according to the directions contained in his will." Then finding that he had charged everything in the first instance, and so charged it and disposed of it, I held, strictly in accordance with what had been done in many other cases, that that which descended did so, charged, and therefore the heir-at-law only bore the proportion of the costs which the devisee would have borne if he had taken it. *Peacock* v. *Peacock* (1) was a similar case.

Mr. *Pearson* expressed himself satisfied with the rule that the descended estate must exonerate the devised estate if limited to descended estates undisposed of at the time of the making of the will, and not applied to estates which become undisposed of by events happening after the will. Mr. *Pearson* argued that view with great confidence, and, as he always does, with great ability, and I looked with anxiety to see if I could find anything to sanction this idea. To me it was new, and I could see no reason for it; but, on the contrary, everything seems to me to be against it. If a testator leaves an estate undisposed of at the making of his will, it may be presumed that he does so because he intends it to go to the heir-at-law; but if he disposes of everything when he makes his will, and by the death of the devisee a lapse takes place, when that lapsed estate goes to the heir-at-law it is not by his intention, but contrary thereto. Therefore, in the first case, where an estate is not disposed of by the will, there is no intention shewn to take it away from the heir-at-law, but rather to give it to him; in the second case, where it becomes undisposed of by subsequent events, there is an intention that it shall not go to the heir-at-law, and it goes to him by accident. There is therefore every reason against the rule which Mr. *Pearson* propounded, and I have not found a single case in which the distinction contended for between estates left undisposed of at the time of the making the will and those that became so by subsequent events, has been taken. I am therefore of opinion that the old rule that descended estates must exonerate devised estates remains in full force, and that the decree in this case as originally made must stand. There is also a case of *In re Ham's Trust* (2), before Lord *Cranworth* when Vice-

(1) 13 W. R. 516. (2) 2 Sim. (N.S.) 106.

Chancellor, in which a testator gave a sum of £6000 stock to the relations of his late wife in such manner, shares, and proportions as if she had died possessed of the fund a spinster and intestate. That would give it to the next of kin. There were sixteen nephews and nieces of the wife living at her death, five of whom died in the lifetime of the testator, and therefore there was a lapse as to five of the sixteen shares. I find that I contended in that case that the costs ought to be borne rateably. However Lord *Cranworth* held that the five shares lapsed, and that the costs were payable out of those shares. Now that is not real estate, but it is an instance of the same general rule that lapsed shares whether real or personal must exonerate the specifically devised property. The decree will stand as I made it on the 27th of May, but I suppose it had better be dated to-day.

Solicitors: Messrs. *Shum, Crossman, & Crossman;* Messrs. *Parkers;* Mr. *S. J. Debenham.*

DE SERRE *v.* CLARKE.

[1872 D. 145.]

Appointment—Instrument creating Power—Period of Vesting—Acquisition of Interest by Appointee—Separate Estate.

A testator gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, and after her death to pay the fund to the children of the daughter as she should by deed or will appoint, and in default of appointment amongst them equally. The daughter appointed by deed the whole of the fund amongst her children, giving the Plaintiff, who was one of them, a specified sum for her separate use absolutely. The Plaintiff, after the death of her grandfather, and before the date of the appointment by her mother, married a Frenchman domiciled in *France*. He died before the date of the appointment, and there was one child only of the marriage.

There was no settlement on the marriage, and the French law of community applied, under which the child became entitled, in the absence of any contrary declaration by the donor, to half the property acquired by her mother during the marriage:—

Held, that the Plaintiff must be considered to have acquired the appointed

V.-C. M.
1874
DE SERRE
v.
CLARKE.

fund from the date of the appointment only, and that the fund not having been acquired during the marriage, did not become subject to the law of community:

Held, also, that the fact of the gift being expressed to be for the separate use was a sufficient declaration to exclude the law of community.

In re Frowd's Settlement (1) is overruled by *In re Vizard's Trusts* (2).

JOHN CARSON, by his will, which was dated the 21st of March, 1835, after making certain dispositions and gifts, gave all the rest of his real and personal estate to certain trustees, and after making certain further dispositions and gifts thereout, continued as follows:—"As to, for, and concerning all the rest, residue, and remainder of my estate and effects so vested in my said trustees, and not by me hereinbefore disposed of, I will and direct that my said trustees do and shall pay the interest, dividends, and annual produce to arise therefrom unto my said daughter *Agnes Turner*, for and during the term of her natural life, the same to be for her own sole and separate use and benefit, and not subject or liable to the debts, control, or engagements of her present or any future husband with whom she may hereafter intermarry; and from and after the decease of my said daughter *Agnes Turner*, then I will and direct that my trustees do pay and dispose of the said residue and remainder of my real and personal estate and effects unto and amongst such of the children of my said daughter *Agnes Turner* as may be living at the time of her decease, in such parts, shares, and proportions, manner and form, as she the said *Agnes Turner*, notwithstanding her present or any future coverture, shall by deed or will direct or appoint, and in default of such direction or appointment unto and equally between such children of the said *Agnes Turner* respectively."

The testator died on the 1st of January, 1836.

Agnes Turner had four children only who survived her, one of whom was the Plaintiff *Caroline Sophia De Serre*, the widow of one *Jérôme Amédée De Serre*, whom she had married on the 1st of January, 1851, by license at the British Consulate at *Genoa*, he being at the time a French subject and a priest of the Roman Catholic Church.

M. *De Serre* was at the time of the marriage domiciled in

(1) 4 N. R. 54. (2) Law Rep. 1 Ch. 588.

France, and died at *Hyères*, in *France*, on the 3rd of May, 1857, without having changed his domicil. The only child of the marriage was *Georgina Agnes Valérie Rival De Serre*, who was born at *Hyères* on the 26th of September, 1854.

By a deed-poll of the 18th of March, 1870, *Agnes Turner* exercised the power of appointment given her by the will of *John Carson*, and thereby directed that if Mrs. *De Serre* should survive her, the sum of £6500, part of the residuary estate, should belong to, and be vested in, and be held in trust for, Mrs. *De Serre*, her executors, administrators, and assigns, for her separate use; and appointments were also made in favour of the other children. *Agnes Turner* died on the 11th of April, 1871.

The bill alleged that the Plaintiff had through her solicitors frequently applied to the trustees of the settlement for payment of the £6500, but that they had refused to pay more than a small sum, and prayed that proper directions might be given for raising and paying the £6500 and interest.

The trustees of the deed of appointment by their answer submitted, as a defence to the suit, that the marriage was a good and valid marriage, and that thereby the Plaintiff acquired a French domicil, and that she and her property, present and future, thereupon became subject to the French laws; and that they were advised by an advocate of the French Bar practising at *Paris* that, assuming that no settlement was made upon the marriage, the pecuniary rights of the Plaintiff and her husband would be ruled by the French law of community of goods; and that they were advised that the reversionary interest to which the Plaintiff was at the time of her marriage entitled under the will of *John Carson* fell into the community of goods and became subject to the French laws; and that Miss *De Serre*, who, they believed, was a French subject, was entitled to one half the £6500 in question, as being the share to which her father would have been entitled if living; and they submitted that Miss *De Serre* was a necessary party to the suit.

The law of community which it was thus sought to apply is contained in the 1401st article of the French Code, and is as follows:—

"*La communauté se compose activement:*

"1° *De tout le mobilier que les époux possédaient au jour de la*

V.-C. M. 1874 DE SERRE v. CLARKE.

célébration du mariage, ensemble de tout le mobilier qui leur échoit pendant le mariage à titre de succession ou même de donation, si le donateur n'a exprimé le contraire.

"2° *De tous les fruits, revenus, intérêts et arrérages, de quelque nature qu'ils soient, échus ou perçus pendant le mariage, et provenant des biens qui appartenaient aux époux lors de sa célébration, ou de ceux qui leur sont échus pendant le mariage à quelque titre que ce soit.*

"3° *De tous les immeubles qui sont acquis pendant le mariage.*"

The suit now came on for hearing, it having been arranged that Miss *De Serre*, without being formally made a party, should appear.

Opinions of eminent French advocates had been taken on both sides, but it was agreed on all hands that the French law of community would operate on the property if taken under the will as in default of appointment, but would not apply if the Plaintiff's interest was considered to have originated with the appointment.

Mr. *Glasse*, Q.C., and Mr. *Macnaghten*, for the Plaintiff:—

There are three reasons against applying the law of community of goods to this property. First: It was not acquired till after the termination of the marriage. The period of acquiring the property is the date of the appointment, not that of the grandfather's will: *Lee* v. *Olding* (1); *In re Vizard's Trusts* (2). They were both cases under the *Bankruptcy Act*, but in principle they are directly applicable. Secondly: The French law of community must be regarded as being in the nature of a settlement, and it is expressly provided that it is not to apply where the donor has shewn an intention to the contrary. Here that intention is shewn by the direction that the property is to be for the separate use of the Plaintiff. Therefore, even if she took under the will, the French law would not apply.

Mr. *J. Pearson*, Q.C., and Mr. *Ince*, for Miss *De Serre*:—

It is quite unnecessary to dispute the authority of *In re Vizard's Trusts* and *Lee* v. *Olding*. On principle it is quite clear that the

(1) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850. (2) Law Rep. 1 Ch. 588.

Plaintiff had at the time of her marriage an interest in the fund sufficient to subject it to the obligations of the French law. Where there is a power of appointment in favour of children, and a gift to them in default of appointment, they take vested interests: *Fearne* on Contingent Remainders (1). It is true that the interest the Plaintiff took was defeasible in the event of her not surviving her mother, but an interest of that kind is one which may be released or sold, and will pass to the creditors in case of bankruptcy: *Higden* v. *Williamson* (2).

The judgment of the Lord Justice *Turner* in *In re Vizard's Trusts* (3) shews that he would have decided the present case the other way. He expressly puts his decision upon grounds in which that case differs from the present. He describes the power of appointment as being something more than a power of selection, and as enabling an appointment to be made in favour of persons who would not take in default of appointment; and he shews that in that case, as in *Duke of Marlborough* v. *Lord Godolphin* (4), the appointor had power to introduce a contingency into the appointment. *Lee* v. *Olding* (5) was a case of an exclusive power, to which the same considerations apply. But in *In re Frowd's Settlement* (6), where, as in the present case, the objects of the power were the same as those who took in default of appointment, the Court held that an obligation to bring a fund into settlement was not defeated by an appointment.

The fact of the trust being expressed to be for the separate use of the Plaintiff can make no difference. It is merely a provision for the mode of enjoyment during coverture, and property bequeathed to the separate use of a married woman is bound by a covenant to settle after-acquired property: *Willoughby* v. *Middleton* (7). The existence of the provision made no difference in the rights of the parties until the property fell into possession, and at that time the Plaintiff was a widow. It therefore could have no application except in the event of her marrying again.

(1) Pages 226, 227, 229.
(2) 3 P. Wms. 132.
(3) Law Rep. 1 Ch. 588.
(4) 2 Ves. Sen. 61.
(5) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850.
(6) 4 N. R. 54.
(7) 2 J. & H. 344.

V.-C. M. 1874 DE SERRE v. CLARKE.

Mr. *Higgins*, Q.C., and Mr. *W. W. Karslake*, for the trustees of the settlement.

July 27. SIR R. MALINS, V.C., after stating the facts, continued:—

The principal question in the suit is whether the Plaintiff took the property on the death of her grandfather, or under the appointment by her mother. Because, if she took under her grandfather's will, it is bound by the French law of community; and if she took it under the appointment, she did not acquire it during the marriage, and is not bound by the French law.

In deciding this question I do not think myself at liberty to do otherwise than follow the decision of Sir *John Stuart* in *Lee* v. *Olding* (1). In that case there was a fund which, by a marriage settlement, was settled upon trust for the husband and wife successively for life, and then upon trust for such one or more of their children as they jointly, or the survivor, should appoint, and in default of appointment for all the children equally. There were two children of the marriage, one of whom was dead, and the wife was dead. The Plaintiff, who was the surviving child, became bankrupt. It is perfectly clear that what he took in default of appointment would go to his assignees. But two days after he obtained his certificate his father appointed the whole of the fund to him. It was argued that the appointment being subsequent to the date of the bankruptcy, could only operate by divesting the share of the assignees in order to vest it again in the bankrupt, and that the appointment must either be simply void or enure for the benefit of the assignees. But it was decided that the right to the property was only acquired under the appointment, and as that was two days after the certificate, the property so acquired passed to the Plaintiff notwithstanding the bankruptcy.

If that case is law it is conclusive in the present suit, because, although if there had been no appointment the Plaintiff would have taken her share under her grandfather's will, as her mother did appoint she took the appointed fund under the appointment, and not under her grandfather's will.

(1) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850.

Then is *Lee* v. *Olding* (1) law? The very same point came before the Court in *In re Vizard's Trusts* (2). In that case no doubt it was considered both by myself and Mr. *Pearson* that *Lee* v. *Olding* could not be sustained. But although there was some difference of opinion between the Lords Justices, the decision of Vice-Chancellor *Stuart* was affirmed by the Lord Justice *Turner*, and the Lord Justice *Knight Bruce* merely said that it was unnecessary for him to say more than that he agreed that the dismissal of the appeal should be without costs. The facts of the case were, that under a will a fund was held by trustees upon trust for the testator's widow for life, and subject to her life interest, for all or such one or more of the children or issue of the testator's brother in such shares and in such manner as the widow should appoint, and in default of appointment for the children equally. The tenant for life appointed the fund equally between all the objects of the power. She appointed exactly that which they would have taken if there had been no appointment. The appointment did not alter their position in the least. But before the appointment one of the appointees had executed an assignment for the benefit of his creditors, and if there had been no appointment his share would have passed to the trustees of the deed. If, therefore, he took under the will notwithstanding the appointment, the creditors would have had the fund. But the decision was that he took under the appointment, and the creditors had no benefit from the fund. Mr. *Pearson* objects that in that case the power extended to objects who would not take in default of appointment. But I think that makes no difference, and that the decision was that an appointee took under the appointment and not under the instrument creating the power.

Then the question is, whether I am at liberty to disregard these authorities, and to say that this lady had at the date of the marriage an interest in the property which she took under the appointment, and that what she so took is subject to the French code.

I consider that on these grounds I am bound to come to the conclusion that she took under the appointment and not under the will.

Mr. *Pearson* pressed on me very strongly *In re Frowd's Settle-*

(1) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850. (2) Law Rep. 1 Ch. 588.

V.-C. M. 1874

DE SERRE v. CLARKE.

ment (1), and I think there is much to be said in favour of it and against *In re Vizard's Trusts* (2); and if I were at liberty to treat the question as still open, I am by no means prepared to say what view I should take. *In re Frowd's Settlement* was decided before *In re Vizard's Trusts*, and though it does not appear from the report, I have no doubt that that case was commented upon by myself and Mr. *Pearson* in the arguments. But the facts of the two cases are not quite similar. *In re Frowd's Settlement* was a case of a covenant in a marriage settlement to settle all property then vested in the wife, and at the time of the marriage she was entitled, in default of appointment, to the funds settled by her father's marriage settlement, and those funds were afterwards appointed to her absolutely for her separate use, and the Vice-Chancellor *Wood* held that the appointment did not divest her interest in the fund, so as to take it out of the operation of the settlement. I am bound to say that, although my own opinion might coincide with that view, I consider that the law is settled the other way.

On another point which has been raised, *Willoughby* v. *Middleton* (3) shews that property given to the separate use of a married woman would be subject to a covenant in a marriage settlement to settle after-acquired property; and to this proposition I quite agree. [His Honour then referred to the opinions of the French advocates, and continued:—]

There is the further difficulty in the case, that the fund is given to the separate use of the Plaintiff. Mr. *Pearson* says that such a provision would only affect the enjoyment of the property in the event of the Plaintiff contracting a second marriage. But the French law of community does not apply where the donor has expressed a contrary intention. Now the direction as to separate use is a declaration that the wife is to have the property exclusively of her husband, and I consider that a sufficient indication of an intention on the part of the donor that the property should not be subject to the French law.

I therefore hold that the Plaintiff is entitled to the fund, first, on the ground that she took it under the appointment and not under the will; and, secondly, on the ground that the declaration

(1) 4 N. R. 54.

(2) Law Rep. 1 Ch. 588.

(3) 2 J. & H. 344.

that it was to be for her separate use was an expression of an intention to the contrary by the donor, which excluded the operation of the French law of community.

Solicitors: Messrs. *Pilgrim & Phillips;* Messrs. *Clarke, Woodcock, & Ryland;* Messrs. *Petgrave & Hodgkinson.*

ATKINSON *v.* LITTLEWOOD.

[1872 A. 60.]

Annuity settled by Deed—Bequest of similar Annuity—Satisfaction—Election.

A. by deed of separation covenanted with the trustee of the deed to pay him an annual sum of £52 during the life of *A.*'s wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. *A.*, by will, subsequently gave certain specific property to trustees to pay out of the rents an annuity of £52 to his wife generally, on the same special quarterly days:—

Held, that there being no direction in the will to pay debts and legacies, and no expression of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the annuity covenanted to be paid by the deed of separation; and that the widow was put to her election.

THIS was a bill filed to administer the estate of *Henry Atkinson*, and to declare the rights of the parties.

By a deed of separation, dated the 17th of July, 1865, made between *Henry Atkinson* and *Ann Atkinson* his wife and *W. F. Singleton*, reciting that the parties had agreed to live separate and apart, *H. Atkinson*, for himself, his heirs, executors, and administrators, covenanted with *W. F. Singleton*, his executors and administrators, that the said *H. Atkinson*, his executors or administrators, would pay to *W. F. Singleton*, his executors, administrators, or assigns, during the life of *Ann Atkinson*, an annuity or yearly sum of £52, commencing from the 1st of February then last past, by four equal payments in each year, that is to say: on the 1st of May, the 1st of August, the 1st of November, and the 1st of February in every year. And it was agreed that the said *W. F. Singleton* should stand possessed of the said annuity of £52 upon

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

trust from time to time during the life of *Ann Atkinson*, when and as the said annuity and the several payments thereof should become due, to pay or cause to be paid the said annuity, and make the several payments thereof respectively into the hands of the said *Ann Atkinson*, for her sole and separate use and benefit, or to such person or persons as she by writing signed with her hand, but not by way of anticipation, should from time to time, notwithstanding coverture, direct or appoint. The deed also contained a covenant by *W. F. Singleton* to indemnify *H. Atkinson* against any debts incurred by *Ann Atkinson*.

From the date of the deed of separation *Henry Atkinson* and *Ann Atkinson* continued to live separate and apart, and the annuity was duly paid by *H. Atkinson* up to the date of his decease.

Henry Atkinson by his will, dated the 20th of January, 1871, gave and bequeathed to his housekeeper, the Defendant *Leah Atkinson*, all the household furniture, goods, chattels, and effects of which he might be possessed at the time of his decease, and he gave, devised, and bequeathed unto the Defendants *B. Littlewood*, *A. Noble*, and *Leah Atkinson*, two houses in *Huddersfield*, and two shops at *Lockwood*, and two cottages in *High Street Paddock*, in *Huddersfield*, upon trust to receive the rents and profits thereof, and after payment of all ground rents and other outgoings, to pay to his wife, *Ann Atkinson*, thereout the sum of £52 per annum, by four equal quarterly payments, on the 1st of February, the 1st of May, the 1st of August, and the 1st of November in each year, the first payment to be made on such quarter-day as should happen next after his decease, with a proportion of such annuity to the representatives of his wife down to the day of her death to be paid immediately after her death, and after payment of such annuity the testator directed his trustees to stand possessed of the surplus of the rents and profits, and accumulate the same until the death of his wife, or until the youngest of his two children should attain the age of twenty-one, and afterwards to divide the said property amongst his children in manner therein mentioned, and the testator gave the residue of his property to his trustees upon such trusts in favour of his children therein named as were before declared concerning the accumulations, after paying the £52 per annum to his wife.

The testator died on the 20th of January, 1872.

The question now raised was whether the testator's widow, *Ann Atkinson*, who was a Defendant to the suit, took the annuity of £52 given her by the will in addition to the same amount secured to her by the deed of separation, or whether she was to be put to her election which of the two annuities she would take.

Mr. *Higgins*, Q.C., and Mr. *Leigh Pemberton*, for the Plaintiffs, the infant children of the testator:—

We submit that the widow of the testator must elect under which of the two instruments she will take the annuity of £52. The authorities are clear and distinct upon this point, that if a testator who owes a person a debt gives by his will a sum equal in amount, or greater than the amount of the debt, then the person shall not take both the debt and the legacy, but the legacy must be taken in satisfaction for the debt. Here there is an annuity given by the will of the same amount exactly as the annuity secured by the deed of separation, and it is made payable on the same very unusual quarterly days of payment, shewing clearly what the intention of the testator was. The only exception to this rule is in the case of a direction in the will to pay debts and legacies. That was so in the cases of *Edmunds* v. *Low* (1) and *Rawlins* v. *Powell* (2); but a direction to pay debts only will not be sufficient to rebut the presumption that a legacy is given in satisfaction for a debt. In *Chichester* v. *Coventry* (3) this principle was recognised; and there it was said by Lord *Romilly* that, in the case of a gift by settlement followed by a will, the persons to be benefited have the right to elect which of the gifts they will take —a right which does not arise in other cases. In *Chichester* v. *Coventry*, however, there was the distinction that the testator gave his property to trustees "in the first place to pay his debts and legacies," and the trusts created by the will were very different from those created by the settlement, which was sufficient to take the case out of the general rule. The rule was also admitted in *Weall* v. *Rice* (4); and it was said that slight differences between the two provisions were not sufficient to repel the presumption

(1) 3 K. & J. 318. (3) Law Rep. 2 H. L. 71.
(2) 1 P. Wms. 297. (4) 2 Russ. & My. 251.

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

against double provisions if, in the opinion of the Court, the two provisions were substantially of the same nature. In this case, there can be no doubt that the two provisions are substantially the same.

Wathen v. *Smith* (1) is still more conclusive, where the testator, having covenanted in his marriage settlement to pay his wife £1000 six months after his decease, gave her by his will £1000, payable three months after his death; and it was held that the legacy was given in satisfaction of the covenant. In *Dawson* v. *Dawson* (2) the same rule is acknowledged. *Fowler* v. *Fowler* (3) is also a strong authority in support of our argument, where it was held that a legacy being greater than the debt due from the testator to his wife by way of arrears of pin-money, was in satisfaction for the arrears due before the making of the will. *Talbot* v. *Shrewsbury* (4), *Chancey's Case* (5), and other cases cited in *Tudor's* Leading Cases (6), are of the same nature, and shew that the principle has long been clearly established; and there is nothing to rebut that rule in the circumstances of this case, which are the simplest that could be presented to the Court.

Mr. *J. Pearson*, Q.C., and Mr. *Nalder*, for the widow of the testator:—

The rule that a debt is held to be satisfied by a legacy is subject to many exceptions; and it is well established that where the circumstances of the two provisions differ, then the rule does not apply. In this case there are facts which completely rebut the presumption that the legacy was in satisfaction of the annuity provided for the wife by the separation deed. Under that deed there is a covenant by the testator to pay to the trustee, *W. F. Singleton*, an annual sum of £52, which is the creation of a personal debt from the testator to the trustee, and in consideration of that covenant the trustee covenants on his part to indemnify the testator against the debts that may be incurred by his wife. The trustee has a personal interest in seeing that the annuity is paid. The annuity under the deed is a charge upon the personal estate

(1) 4 Madd. 325.
(2) Law Rep. 4 Eq. 504.
(3) 3 P. Wms. 353.
(4) Prec. Ch. 394.
(5) 1 P. Wms. 408.
(6) Last Ed. vol. ii. pp. 345, 346, 369.

generally, but in the will there is a specific gift of certain houses upon which the annuity is charged. There cannot be a case in which the nature of the two provisions could be more distinct. The covenant in the deed is a debt to *W. F. Singleton;* the legacy is a gift to the wife. How, then, can an annuity given to *A.* be a satisfaction of a debt due to *B.?*

There is a great distinction between a legacy given in satisfaction of a debt and a gift in lieu of a portion to a child. This point of difference between the two provisions is stated very clearly by Lord *Cranworth* in *Chichester* v. *Coventry* (1), where he says: "Where a parent provides for a daughter by settlement on her marriage, binding himself to secure at his death a stipulated sum for the benefit either of her absolutely, or of her and her husband and their issue, and afterwards makes provision for her or them by his will, it is obvious that without the consent of those entitled under the settlement he cannot substitute the benefits he may have chosen to confer by his will for those which he had already secured by deed." How, then, can the principle of satisfaction apply when the person to whom the debt is due is a different person from that to whom the legacy is given? The annuity under the separation deed is a legal debt to the trustee, but an equitable debt to the wife. It is a debt for which there is a good consideration given in respect of the covenant by the trustee to indemnify the husband against his wife's debts. The debt due under the covenant must be paid in full out of any property which the husband may have, but it is not so with the legacy under the will, as it is charged upon specific property which may not be sufficient to satisfy the legacy. Then under the deed of separation the annuity is given to the separate use of the lady without power of anticipation, while the legacy by the will is given to her generally. The two provisions, therefore, are totally different in their nature. In *Eastwood* v. *Vinke* (2) the Master of the Rolls expressed this principle: "As money and lands are things of a different nature, the one shall not be taken in satisfaction of the other. Whatever is given by a will is *primâ facie* to be intended a bounty and benevolence." It

(1) Law Rep. 2 H. L. 87.

(2) 2 P. Wms. 613, 616.

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

would be no intention of benevolence to give one annuity in lieu of another; and it requires very strong expression of intention to do away with the intended benevolence. In *Richardson* v. *Greese* (1) it was held that the circumstances were sufficient to take away the presumption that the legacy was given in satisfaction of a debt, and yet in that case the legacy was double the amount of the debt, and there were expressions in one part of the will that the testatrix did not mean to confer any extra benefit upon the legatee, who was her servant. *Smith* v. *Smith* (2) is a case in our favour; for there Vice-Chancellor *Stuart* refused to declare that a legacy was a satisfaction *pro tanto* of a debt payable to the legatee; and His Honour said that a presumption of a legacy being a satisfaction of a debt will be rebutted by the slightest circumstance. In that case the legatee was a *cestui que trust* under the testator's marriage settlement, and the debt was due to the trustee ef the settlement; and Vice-Chancellor *Stuart* said the trustee was a totally different person. How, then, could it be said that, so long as the trustee remained a creditor of the testator's estate, the debt due to him had been satisfied by a legacy bequeathed to another person?" This case is in all respects similar to that.

In *Wathen* v. *Smith* (3) there was a direction to pay debts and legacies, which was held in *Chichester* v. *Coventry* (4) to rebut the general presumption as to a legacy being a satisfaction of a debt, so that case is directly opposed to *Chichester* v. *Coventry;* and, moreover, it was disapproved of in the case of *Cole* v. *Willard* (5) by the Master of the Rolls, who said: "I do not concur with Sir *John Leach* in his observation in *Wathen* v. *Smith*, that the testator must not be understood to include under the word 'debt' his liability on bond or covenant made on his marriage, although to be discharged after his decease. It seems to me that a charge of debts, whether standing alone or accompanied by a charge of legacies, is of equal force on the question of rebutting the presumption of satisfaction." The Master of the Rolls there decided that the provision for the wife under the settlement was not satis-

(1) 3 Atk. 65.
(2) 3 Giff. 121.
(3) 4 Madd. 325.
(4) Law Rep. 2 H. L. 87.
(5) 25 Beav. 568, 572.

fied by the provision made for her by the will. Practically, therefore, *Wathen* v. *Smith* (1) is not a case to be relied upon.

The argument advanced for the Plaintiffs, that these two provisions are made payable on the same unusual quarterly days of payment, is answered by the case of *Bartlett* v. *Gillard* (2), where the two annuities were payable on the 27th of January and the 27th of July in each year; and there it was held that the legatee was entitled to two distinct annuities.

We say, therefore, that the annuities being given to different persons and secured upon different properties, this is a case in which the Court will hold that the rule as to the legacy being a satisfaction of the debt is repelled by the circumstances of the case.

Mr. *Ince*, for the trustees of the will.

Mr. *Druce*, for persons interested in the residue.

Mr. *Higgins*, in reply:—

The rule we contend for is so well established by numerous cases, that it cannot now be upset. It is most clearly stated by Lord *Hardwicke* in *Richardson* v. *Greese* (3), and there it was held that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond of the testator, notwithstanding the difference of the trusts. In that case the daughter was put to her election. Lord *Cottenham*, in *Thynne* v. *Earl of Glengall* (4), lays down the same principle, and explains very fully such deviations as are looked upon with favour by the Court, and the circumstances under which the rule may be repelled. In that case there was sufficient to take away the presumption that the legacy was given in satisfaction of the debt, because the will contained the words "after debts and legacies are paid then I give," &c.; and it was considered that these words were much stronger than those in *Chancey's Case*, before Lord Chancellor *King* (5), where it was held that the legacy was a bounty and not satisfaction. *Linguen* v. *Souray* (6) is a case which also supports our argu-

(1) 4 Madd. 325.
(2) 3 Russ. 149.
(3) 3 Atk. 65.
(4) 2 H. L. C. 131.
(5) 1 P. Wms. 408.
(6) Prec. Ch. 400.

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

ment, and there it was decided that a devise to the testator's wife of property differing in its nature from that which he had settled upon her, but of greater value, was to be taken in satisfaction of the settled property. In that case there was quite as much difference in the nature of the provisions as there is here; and in *Bengough* v. *Walker* (1) the difference in the nature of the property which was held to be a satisfaction of a portion was much greater.

SIR R. MALINS, V.C.:—

The case argued is this, whether the widow of the testator is entitled under his will to an annuity of £52 a year, which he thereby gives to her, and also to an annuity of £52 a year, secured to her by a deed upon his separation from her. It seems that the testator, who was a small tradesman, formed an unhappy connection with a relative, who was also his housekeeper, which led to a separation from his wife, and on the 17th of July, 1865, he executed in the ordinary form a separation deed. The form of the separation deed is, that he covenants to pay to the trustee for the wife £52 per annum, payable on the 1st of February, the 1st of May, the 1st of August, and the 1st of November—every three months. And in consideration of this, the trustee covenants to indemnify him against the debts of the wife; and as usual on such occasions they lived apart. The husband and wife thus living apart from 1865, he made his will in 1871; and by his will he gave and bequeathed to his housekeeper, *Leah Atkinson*, all the household furniture, goods, chattels, and effects of which he might be possessed at the time of his decease, and he gave, devised, and bequeathed unto the Defendants, *Bryan Littlewood*, *Alfred Noble*, and *Leah Atkinson*, their executors, administrators, and assigns, certain leasehold houses therein specified, upon trust to receive the rents and profits thereof, and after payment of all ground rents and outgoings to pay to his wife, the Defendant *Ann Atkinson*, thereout the sum of £52 per annum, by four equal quarterly payments on the 1st of February, the 1st of May, the 1st of August, and the 1st of November in each year, the first payment to be made on such quarter day as should happen next after his decease.

(1) 15 Ves. 507.

Now, if I were at liberty to conjecture upon the subject, and act upon what I believed to be the testator's intention, I should certainly come to the conclusion that he intended by this to give his wife an additional £52 a year, and not merely, by this bequest, to satisfy the debt which he had contracted, because if it is in satisfaction of a debt contracted by the separation deed, then the wife gets nothing whatever by the will. The circumstance that he directs this annuity to be paid on the same days on which he had contracted to pay the other by the separation deed, although it may be argued that he meant the same annuity because it is to be paid at the same time, yet, on the other hand, is open to the observation that he makes it payable on the same day, because, knowing she is to receive the separation money on those days, he intends to double it, and, in order to save unnecessary trouble, he makes it payable also on the same days.

That is the conclusion to which I should arrive if I were unfettered by authority; but the authorities are so clearly settled, that, whether it be portions or whether it be debts, the old rule laid down in the case of *Talbot* v. *Shrewsbury* (1) applies, and has been so frequently followed that I apprehend it is impossible for me to do otherwise than to follow it in the present case. Many other Judges seem to have thought the same as I do with regard to this rule, but unfortunately they have not carried it into effect. My impression is, certainly, that when a man has contracted a debt and gives money to his creditor, he intends bounty, not merely the payment of an obligation; and therefore he gives something, and does not merely intend to satisfy the debt. The case of *Fowler* v. *Fowler* (2) affords an apt illustration of what I mean. There the testator, in consideration of a marriage then intended, and afterwards solemnized, and of a considerable portion brought by his wife, the Defendant, settled £100 per annum in trust for her separate use, for pin-money, two years' arrears whereof became due (that is £200), and then the husband made his will, wherein, expressing great affection for his wife, he gave her a legacy of £500. After the making of the will another year's arrear was incurred, and then the husband died. So that £300 was due for pin-money, and he gave her £500. Upon the strength of this rule it was decided that she was not to have the legacy in full, but

(1) Prec. Ch. 394. (2) 3 P. Wms. 353.

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

that, so far as the pin-money was in arrear, the legacy was a satisfaction of the pin-money, and not a legacy. I have not a shadow of doubt that he intended her to have the £300 and also the legacy of £500. But the Lord Chancellor admitted it to have been the general practice, "where there is a debt due from the testator to a third person, and the legacy given to such person is as much or more than the debt, to hold such legacy a satisfaction of the debt; and this being established as a rule (notwithstanding, were it a new point, he should hardly have come into it, and it had with great reason been urged in opposition to the maxim that a man ought to be just before he is bountiful, and that where there are assets the testator may with as much reason be construed both just and bountiful, yet) it must be of very ill consequence to unsettle or alter it; because, at that rate, no counsel would know how to advise his client." Therefore deciding—here is a debt and there is a legacy—the legacy is not merely bounty, it is in satisfaction of the debt. Consequently, to the extent of £300, the legacy was extinguished, and the widow got £200 only.

This being, then, a settled rule, I am not at liberty to depart from it unless I can clearly satisfy myself that there is such an intention in the will as to warrant me in coming to a different conclusion. If this testator had directed his debts to be paid, and then had given this annuity, I should have found sufficient warrant, because that is the very point decided in *Chichester* v. *Coventry* (1). The testator, on the marriage of one of his daughters to Lord *John Chichester*, covenanted to pay to trustees £10,000, which was settled upon her and her family in the usual way. He afterwards made his will, and after giving certain legacies, he directed the residue to be equally divided between his two daughters; but he directed all his debts to be paid. The question was, whether Lady *John Chichester* was entitled to £10,000, and also the moiety of the residue. In that case there was a great difference of opinion. At first Vice-Chancellor *Wood* decided that the £10,000 must be accounted for. There were not to be double portions, and therefore Lady *John Chichester* only got a moiety of the residue. It went to the Lords Justices, and they differed. Lord Justice *Turner* agreed with the Vice-Chancellor *Wood* that she must not have the £10,000. Lord Justice *Knight Bruce*

(1) Law Rep. 2 H. L. 71.

thought differently. It went to the House of Lords. Lord *Chelmsford*, Lord *Cranworth*, Lord *Romilly*, and Lord *Colonsay* were the Judges who heard that appeal, and those four learned Judges unanimously decided that she was entitled to the £10,000 and to the moiety of the residue. But why? The reason they came to that conclusion was, that the testator directed his debts to be paid; and directing his debts to be paid, this was a debt; and the debts having been paid, the residue was given equally between the two daughters. Therefore, notwithstanding this conflict of opinion, there was unanimity in the House of Lords, and they decided upon that ground, and upon that ground only, that she was entitled to the £10,000 as well as the moiety of the residue.

Then the case of *Wathen* v. *Smith* (1) was much relied on. That is a case in which a testator, upon his marriage, covenanted that he would leave to his wife £1000, to be paid six months after his decease. By his will he gave his wife £1000, to be paid three months after, and it was held by Sir *John Leach* that the legacy of £1000 was in satisfaction of the debt, and therefore the widow got nothing by the will.

There, again I am satisfied that the conclusion Sir *John Leach* arrived at was contrary to the intention, for I am sure the testator intended to give his wife £1000 in addition to what he had contracted to give her. And there was another reason in that case why she ought to have had it: there was a direction to pay all his debts, and the contract to pay the £1000 in the marriage settlement created a debt. There was a direction, therefore, to pay debts, and upon the principle of *Chichester* v. *Coventry* (2) the debt ought to be paid, and the debt being paid, she ought to have the £1000 in addition. I therefore concur in the opinion of Lord *Romilly* expressed in the case of *Cole* v. *Wellard* (3).

[Mr. *Higgins*:—I ought to say that in that case the covenant was to pay after the decease. There was no debt at the time of the death. That distinction is material.]

No; the moment he died there was a debt. That makes no difference whatever, because it was one of the debts the trustees were obliged to pay. Therefore, having directed his debts to be paid, that ought to be paid.

(1) 4 Madd. 325. (2) Law Rep. 2 H. L. 71. (3) 25 Beav. 568.

V.-C. M. 1874 ATKINSON v. LITTLEWOOD.

Mr. *Pearson* says great doubts have been expressed by the learned Judges, and cites Lord *Hardwicke,* in 1743, and Lord *Cottenham,* in 1848, more than a century apart, both of whom expressed the opinion that this rule is much weaker when it is in satisfaction of a debt than when it is in satisfaction of a portion. I perfectly agree with those observations, but it unfortunately happens that neither of those learned Judges have decided anything in accordance with what they said, because I have not been able to find one single case, and none have been cited to-day, where there has been a legacy and a debt, in which the Court has decided in favour of bounty and debt also, except the case of *Bartlett* v. *Gillard* (1).

Now that is a very peculiar case. The mother, *Mary Gillard,* by a codicil to her will bequeathed certain leasehold property to her son *Richard Gillard,* his executors, administrators, and assigns, during so many years of her, the testatrix's, term therein as should run out in the lifetime of her daughter *A. M. Bartlett,* subject to the yearly sum of £12 for the sole use of her daughter. She died and *Richard* took the property subject to the payment of this annuity. The property only was charged. Having the property thus charged, *Richard Gillard,* by his will, made the following gift to a nephew: "Lastly, I do make, constitute, and appoint *R. Gillard* my whole and sole executor of all my land for ever, and leasehold property, here or at *Beeston,* or money that shall become due for the same, paying *Maria Bartlett* £12 per annum by half-yearly payments, viz., the 27th of January and 27th of July, and my sister *Elizabeth Gillard* £20." Now, considering that the testator, *Richard Gillard,* held property liable to pay out £12 per annum, I certainly should think he merely meant to give the property, paying her that which he is bound to pay, not that he meant to give her anything in addition. I think it so struck Lord *Eldon,* because he says (2): "The next question is whether the annuity given by the will of *R. Gillard* is to be taken as a substitution for the former annuity payable to the separate use of *A. M. Bartlett?* The facts relied upon on the part of the Defendant are, that the amount of the two annuities and the days of payment are precisely the same. And if I were to indulge in conjecture, I might possibly

(1) 3 Russ. 149. (2) 3 Russ. 155.

come to the conclusion that the testator had no intention, by the words 'paying to *A. M. Bartlett* £12 per annum,' to create a new and additional payment. But the second annuity is charged upon the freehold as well as the leasehold property; and being payable to the wife generally and not to her separate use, I think the case comes sufficiently within the authorities and doctrine applicable to this subject to repel the presumption that the second annuity was intended as a substitution and satisfaction for the first. The consequence is that both annuities will be payable from the testator's death." It does certainly appear that that authority has not been cited much or relied upon on this point, and I think it must have turned very much upon the special facts. Under these circumstances I am not able to regard it as an authority which can bind me upon the subject. The general rule, therefore, is clearly established, unless the will, from some circumstance, shews a contrary intention. Here there is a complete absence of anything to shew an intention beyond the fact that the testator had created a liability by the separation deed to pay this annuity of £52. He simply gives the same person an annuity payable at the same time, charged upon a particular portion of his property; and although if I were at liberty to conjecture what it was his intention to do, I might decide differently, yet upon the authorities it is impossible to come to any other conclusion than that I must regard the annuity given by the will as given in satisfaction of that debt which had been created by the separation deed. My decision will therefore be, that the widow is entitled to one annuity only, and she electing to take as creditor under the separation deed, she is entitled accordingly. Then, it appearing that the personal estate not specifically bequeathed is insufficient for the payment of the debts, there must be an inquiry as to the personal estate specifically bequeathed, and what has become of it, and an account of the leaseholds specifically bequeathed.

Solicitors for the Plaintiffs: Messrs. *Edwards, Layton, & Jaques.*

Solicitors for the Defendants: Messrs. *Durnford & Co.*; Messrs. *Shum, Crossman, & Crossman.*

V.-C. M.
1874
July 6.

NATIONAL SOCIETY *v.* SCHOOL BOARD OF LONDON.

[1872 N. 51.]

ATTORNEY-GENERAL *v.* ENGLISH.

[1872 A. 71.]

School Trustees—Transfer to School Board—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75)—*Consent to Alienation—Conditions of Foundation.*

Under section 23 of the *Elementary Education Act*, 1870, managers of elementary schools are empowered to make arrangements for the transfer of schools to school boards formed under the Act, but it is provided that where there is any instrument declaring the trusts of a school, and such instrument contains any provision for the alienation of the school by any persons in any manner or subject to any consent, such an arrangement shall only be made by the persons in the manner and with the consent so provided; and it is also provided that the Education Department of the Privy Council shall consider and have due regard to any objections and representations respecting a proposed transfer which may be made by any person who has contributed to the establishment of such schools.

The 14th section of the Act also provides that no religious catechisms or formulary which is distinctive of any particular denomination shall be taught in any board school:—

Held, that in the case of a school established by and united with the *National Society*, on the express condition that the children attending it were to be instructed in the Holy Scriptures and in the Liturgy and Catechism of the Church of *England*, the instrument declaring the trusts of the school providing that the school was to be always in union with, and conducted according to the principles of, and in furtherance of the ends and designs of, the *National Society*, but containing no provision whatever for its alienation, the consent of the *National Society* was not required to a transfer of the school to a school board; and that the proper mode for the society to give effect to any objections to a transfer was by appearing before the Education Department.

THE *National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales* was incorporated and established by a Royal Charter dated the 22nd of May, 1817, which recited, amongst other things, that the Society had been instituted principally for the purpose of educating the children of the poor in the doctrines and discipline of the Established Church according to the Liturgy and Catechism provided for that purpose, and provided that the office of president

of the Society should be a perpetual office and be filled by the Archbishop of *Canterbury* for the time being, and that the vice-presidents should be the Archbishop of *York* and the bishops of both provinces for the time being, and two other persons, who should be either temporal peers of the *United Kingdom* or members of the Privy Council.

The work of the Society had been carried on partly by becoming associated with diocesan or local boards established in various parts of *England*, which it aided by grants of money and otherwise, and which were united with it on condition of conforming to a rule expressed in the following words:—

"That diocesan boards and district societies be received into union with the *National Society* on professing their adherence to its principles, as set forth in the charter, their desire to promote its objects, and their willingness to transmit to the Society periodical reports on the state and progress of education in their respective districts."

The Society had also been accustomed to make grants of money to the promoters or managers of particular schools, and to unite such schools to itself, requiring the following terms of union:—

"1. The children are to be instructed in the Holy Scriptures and in the Liturgy and Catechism of the Established Church.

"2. With respect to such instruction, the schools are to be subject to the superintendence of the parochial clergyman.

"3. The children are to be regularly assembled for the purpose of attending Divine service in the parish church or other place of worship under the Establishment, unless such reason be assigned for their non-attendance as is satisfactory to the managers of the school.

"4. The masters and the mistresses are to be members of the Church of *England*.

"5. A report on the state and progress of the schools is to be made at Christmas in every year to the diocesan board, the district society, or the *National Society*, and the schools are, with the consent of the managers, to be periodically inspected by persons appointed either by the bishop of the diocese, the *National Society*, or the Diocesan Board of Education.

V.-C. M. 1874 NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON. — ATTORNEY-GENERAL v. ENGLISH.

"6. In case any difference should arise between the parochial clergy and the managers of the schools with reference to the preceding rules respecting the religious instruction of scholars, or any regulation connected therewith, an appeal is to be made to the bishop of the diocese whose decision is to be final."

In the year 1867, the Society, in conjunction with the *Surrey Church Association*, and several persons who became contributors, established a church school for the parish of *Emmanuel, Camberwell*, and with this object a piece of land was, by the consent and direction of the then vicar, purchased and conveyed by a deed duly inrolled in Chancery, and dated the 25th of February, 1867, to the minister and churchwardens of the district parish of *Emmanuel, Camberwell*, to hold to the use of the minister and churchwardens upon the following, amongst other trusts:—

"To permit the said premises, and all other buildings thereon erected or to be erected, to be for ever hereafter appropriated and used as and for a school for the education of children and adults, or children only, of the labouring, manufacturing, and other poorer classes in the ecclesiastical district of *Emmanuel, Camberwell*, aforesaid, and for no other purpose; and it is hereby declared that such schools shall be at all times open to the inspection of the inspectors of schools for the time being, appointed in conformity with the Order in Council bearing date the 10th day of August, 1840, and shall always be in union with, and conducted according to the principles and in furtherance of the ends and designs of, the *National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales*, and subject to and in conformity with the declaration aforesaid."

This last-mentioned clause was always required by the Society to be inserted in trust deeds as a condition of obtaining a grant.

It was also provided by the trust deed that the officiating minister, for the time being, of the ecclesiastical district, should have the superintendence of the religious and moral instruction of the scholars attending the school, and might use, or direct the premises to be used, for the purposes of a Sunday school under his exclusive control and management; but that, subject to certain powers of interference in the case of the dismissal of a master,

mistress, or assistant, vested in the bishop of the diocese or certain arbitrators, the management should be vested in and exercised by a committee, consisting of the principal officiating minister for the time being, his licensed curate or curates, if the minister should appoint him or them to be a member or members of such committee, such of the churchwardens for the time being of the district as should be members of the said church, and three other persons therein named, so long as they continued to be subscribers of at least 20*s.* a year, and to be members of the Church of *England*, and in case of a vacancy the successors of the three named members were to be selected by the subscribers in the manner therein mentioned, and every one so appointed was required to sign the following declaration:—

"I, *A. B.*, do hereby solemnly and sincerely declare that I am a member of the United Church of *England* and *Ireland* as by law established."

It was also provided that no person should be appointed, or continue to be the master or mistress of the school, who should not be a member of the Church of *England*. But the trust deed contained no provision for the alienation of the school by any persons, or in any manner, or subject to any consent.

The school was accordingly established, and a school-house and master's residence erected on the land purchased, at a cost altogether of £2600, towards which the *National Society* made a grant of £200. A committee of management was also duly constituted. No steps, however, were subsequently taken to keep up the numbers of the committee till the summer of 1871, when it had dwindled down so as to consist only of the Rev. *William English*, who was then the incumbent of the district, and the churchwardens. It appeared also that at that time the financial state of the school was not very satisfactory.

In the summer of 1871 a meeting of persons interested in the welfare of the school took place, and Mr. *Henry John Spurling*, the Relator and Plaintiff in the second suit, and nine other persons, formed themselves into a provisional committee for the purpose of working the school on a more satisfactory footing during the ensuing year, and towards the end of September, 1871,

V.-C. M. 1874

NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON.

ATTORNEY-GENERAL v. ENGLISH.

a meeting of the provisional committee so formed was held at the suggestion of the vicar to consider whether any steps should be taken for the purpose of effecting a transfer of the school to the School Board of *London*, which had then been formed under the provisions of the *Elementary Education Act*, 1870 (33 & 34 Vict. c. 75) (1); but it was arranged that the question should be left open till Lady Day, 1872.

(1) The 23rd section of the Act is as follows:—

"The managers of any elementary school in the district of a school board may, in manner provided by this Act, make an arrangement with the school board for transferring their school to such school board, and the school board may assent to such arrangement.

"An arrangement under this section may be made by the managers by a resolution, or other act, as follows; (that is to say),

"(1.) Where there is any instrument declaring the trusts of the school, and such instrument provides any manner in which, or any assent with which a resolution or act binding the manager is to be passed or done, then in accordance with the provisions of such instrument;

"(2.) Where there is no such instrument, or such instrument contains no such provisions, then in the manner and with the assent, if any, in and with which it may be shewn to the Education Department to have been usual for a resolution or act binding such managers to be passed or done;

"(3.) If no manner or assent can be shewn to have been usual, then by a resolution passed by a majority of not less than two-thirds of those members of their body who are present at a meeting of the body summoned for the purpose, and vote on the question, and with the assent of any other person whose assent under the circumstances appears to the Education Department to be requisite.

"And in every case such arrangement shall be made only—

"(1.) With the consent of the Education Department; and

"(2.) If there are annual subscribers to such school, with the consent of a majority, not being less than two-thirds in number, of those of the annual subscribers who are present at a meeting duly summoned for the purpose, and vote on the question:

"Provided that where there is any instrument declaring the trusts of the school, and such instrument contains any provision for the alienation of the school by any persons, or in any manner, or subject to any consent, any arrangement under this section shall be made by the persons in the manner and with the consent so provided.

"Where it appears to the Education Department that there is any trustee of the school who is not a manager, they shall cause the managers to serve on such trustee, if his name and address are known, such notice as the Education Department think sufficient, and the Education Department shall consider and have due regard to any objections and representations he may make respecting the proposed transfer.

"The Education Department shall consider and have due regard to any objections and representations respecting the proposed transfer which may be made by any person who has contributed to the establishment of such school.

"After the expiration of six months

A meeting of the subscribers took place on the 12th of February, 1872, under the direction of the vicar, when the question of the proposed transfer to the School Board of *London* was again considered, and certain resolutions were proposed with a view to carry out the transfer, and on the resolutions being put to the vote, the vicar, who acted as chairman, ruled that they were carried; but his ruling was disputed, and it was arranged that a further meeting of the subscribers should be held on the 20th of May, and in the meantime steps were taken to fill up the vacancies in the then existing committee.

This meeting was accordingly held, and was adjourned to the following day, when the vicar, as chairman, again ruled that the resolutions were carried. This ruling was again disputed. He proceeded, however, in conjunction with such of the members

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from the date of transfer the consent of the Education Department shall be conclusive evidence that the arrangement has been made in conformity with this section.

"An arrangement under this section may provide for the absolute conveyance to the school board of all the interest in the school-house possessed by the managers or by any person who is trustee for them, or for the school, or for the lease of the same with or without any restrictions, and either at a nominal rent, or otherwise, to the school board, or for the use by the school board of the school-house during part of the week, and for the use of the same by the managers or some other person during the remainder of the week, or for any arrangement that may be agreed on. The arrangement may also provide for the transfer or application of any endowment belonging to the school, or for the school board undertaking to discharge any debt charged on the school not exceeding the value of the interest in the school-house or endowment transferred to them.

"When an arrangement is made under this section the managers may, whether the legal interest in the school-house or endowment is vested in them, or in some person as trustee for them or the school, convey to the school board all such interest in the school-house and endowment as is vested in them, or in such trustee, or such smaller interest as may be required under the arrangement.

"Nothing in this section shall authorize the managers to transfer any property which is not vested in them, or a trustee for them, or held in trust for the school, and where any person has any right given him by the trusts of the school to use the school for any particular purpose independently of such managers, nothing in this section shall authorize any interference with such right, except with the consent of such person.

"Every school so transferred shall to such extent and during such times as the school board have under such arrangement any control over the school, be deemed to be a school provided by the school board."

V.-C. M. 1874

NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON.

ATTORNEY-GENERAL v. ENGLISH.

of the committee as took the same view with himself, to carry the resolutions into effect, and a transfer of the school to the School Board was prepared, and application was made to the Education Department of the Privy Council to give the consent thereto required by sect. 23 of the *Elementary Education Act*, 1870.

The *National Society* thereupon appeared before the Education Department and objected to the transfer, but their objections were overruled, and the consent of the Department was obtained, and the transfer executed. It provided for setting apart a portion of time on two days in the week on which the school might be used for religious teaching in accordance with the principles of the Church of *England*.

The suit of *Attorney-General* v. *English* was then instituted by information and bill by Mr. *Spurling*, as Relator and Plaintiff, seeking to set aside the transfer, both on the ground that it had been made without the consent of the *National Society* and that the resolutions did not really receive the sanction of the statutory majority of the subscribers.

The *National Society* then filed their bill for the purpose of asserting their right to prevent any transfer of a school established by or connected with them to a school board except with their consent.

In this suit no question was raised as to the validity of the resolutions for transferring the school to the School Board. With regard to the circumstances under which the *Elementary Education Act*, 1870, was passed, the 15th paragraph of the *National Society's* bill stated as follows:—

"When the *Elementary Education Act*, 1870, was under the consideration of the Legislature, the Plaintiffs exerted themselves to protect the interests of the numerous schools existing throughout the country which had been established and were maintained on the basis of religious education being taught therein according to the principles of the Established Church, including, more especially, those schools which had been established with the assistance of the Society, or had been placed in union with it. In consequence of these exertions, divers alterations were made in the Act during its progress through Parliament, and the intention of

the Act, as ultimately passed, was, and is, that no school in union with the Society should be transferred to a school board under the Act without the Society's consent. It was well known that, as the fact was, according to the rules and practice of the Society no alienation of any school in union with it was permitted before the passing of the Act without the Society's consent, and this restriction on alienation was and is intended to be preserved by the Act."

The bill then prayed for a declaration that the provisions of the trust deed ought to be observed in the management of the school, and that no departure from the principles of education according to which such school was established could properly be effected without the sanction of the *National Society*, and also for a declaration that transfer was illegal, and an order for a re-conveyance to the trustees of the school.

The two suits now came on to be heard on motion for decree, but the general question, whether the consent of the *National Society* was necessary to the validity of a transfer to a school board of a school which had been aided by them, was alone argued.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the *National Society*:—

The necessary effect of a transfer to the School Board will be to subject the school so transferred to the provisions of sect. 14 of the *Elementary Education Act* (1), and all teaching in connection with the Catechism or formularies of the Church of *England* will be absolutely prohibited. But by the express terms of the trust deed it is a clear breach of trust on the part of the trustees to permit a transfer which excludes teaching in accordance with those principles.

It was to prevent such breaches of trust that the clause requiring the consent to a transfer of all persons whose consent was required

(1) The 14th section of the Act is as follows:—

"Every school provided by a school board shall be conducted under the control and management of such board in accordance with the following regulations:—

"1. The school shall be a public elementary school within the meaning of this Act;

"2. No religious catechism or religious formulary which is distinctive of any particular denomination shall be taught in the school."

V.-C. M. 1874

NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON.

ATTORNEY-GENERAL v. ENGLISH.

for alienation was inserted in the Act. In this case it is the *National Society* whose consent is required. Subscribers to the *National Society* would be much surprised to find that schools established by them could be diverted from the purpose for which they were founded without the consent of the Society.

The primary trust to which the school is subject is its union with the *National Society*, and the managers can only transfer the school subject to the trust. The obligation to obtain the consent of the *National Society* was evaded in the present case by omitting all reference to the fact of the connection between the school and the Society in the application to the School Board. But the trust can only be discharged by obtaining the consent of the Society to the transfer.

Mr. *Glasse*, Q.C., Mr. *Speed*, and Mr. *Parke*, for the School Board of *London* and the other Defendants:—

This question has to be considered with reference to the purpose and policy of the *Elementary Education Act*, 1870, which was, amongst other things, to bring old schools under the management of school boards to be constituted under the Act. The mode provided for effecting this was by transferring them to school boards under the provisions of sect. 23. That section is carefully and elaborately framed so as to give all persons interested in a school suitable opportunities of giving effect to their views. But it was not intended that a person or society should have the power of obstructing the working of the Act by vetoing a transfer which the managers desired to make. The section first of all provides the mode in which the managers of a school are to proceed in effecting a transfer. Then follows the clause relied on by the Society, but which does not apply to them, because the present trust deed contains no provision for alienation at all. The clause is, in fact, chiefly a prospective one. But the *National Society* have really all the power they require by the clause which follows, by which they are enabled to appear before the Education Department and state their objections to the transfer. And they have in fact availed themselves of this power, and have appeared before the Education Department and stated their objections.

If the view contended for by the *National Society* were correct,

no transfer could ever be effected except with the consent of the founder of a school.

The question has, to a certain extent, been raised in another form in *In re Burnham National Schools* (1), where it was held that there was no right of objection to the appointment of particular persons as new trustees of a school by the Charity Commissioners, on the ground that the persons so appointed might afterwards transfer the school to a school board.

Mr. *Cotton*, in reply:—

This question affects not only the *National Society*, but all bodies having anything to do with religious education.

It is not the object of the Act to secure an uniform system of education, but simply to supply any deficiencies in the existing means of education.

It is quite inconsistent with the scheme of the trust deed that the school should be put under the School Board; for the 14th section of the Act expressly excludes all religious formularies. There is nothing in the general scope of the Act empowering managers to violate their trust deed. The 23rd clause only applies where the managers of a school have power to control the education so as to exclude religion, and this is impossible in the case of national schools. The only consistent construction to be put upon the Act is to hold that where a trust deed provides for union with a particular body no transfer can be made without the consent of that body.

SIR R. MALINS, V.C.:—

The question now raised is of very great importance. The *National Society* was incorporated and established by Royal Charter in 1817, with the express object of "promoting the education of the poor in the principles of the Established Church throughout *England* and *Wales*;" and it appears by a report of the Society that since its institution it has spent more than £500,000 in carrying out that purpose. The Society is, therefore, entitled to the highest respect and regard.

It is not to be wondered at that a society instituted for such a

(1) Law Rep. 17 Eq. 241.

V.-C. M. 1874

NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON.

ATTORNEY-GENERAL v. ENGLISH.

purpose should feel great anxiety at the prospect of the transfer of any schools established by or in connection with it to a school board when it is found that, under the 14th section of the *Elementary Education Act*, 1870, any school so transferred would be subject to the provision that no religious catechism or religious formulary distinctive of a particular denomination should be taught in it.

Then the question which has been raised between the *National Society* and the School Board of *London*, whether this school at *Camberwell* can be so transferred without the consent of the Society, must be decided upon grounds applicable to the case of every school established by the *National Society*—that is to say, upon the proper construction of the Act of Parliament in question; but before I go to that, I think I must read the 15th paragraph of the bill. [His Honour then read the 15th paragraph, and continued:—]

That is a statement that it was intended that this power of vetoing a transfer should be preserved, but I confess that I have not been able to find that the Act reserves any such power.

Now the particular case out of which this question arises is this: It appears that in the year 1867, the clergyman of the parish and a number of gentlemen who, no doubt, were living in the district, were very desirous of establishing a school in connection with the Church of *England*, and they expended some £2600 in establishing the school. As was to be expected, they applied to the *National Society* for assistance, and the Society contributed £200, and a trust deed was executed.

[His Honour then read the clause of the trust deed above stated, and continued:—]

There is no provision in the deed for an alienation of the school, and there is certainly no provision that it should not be alienated without the consent of the *National Society*. I am therefore unable to find that there is any restriction on alienation.

Then, in the year 1871, the *Elementary Education Act*, 1870, having been passed, some of the parties connected with this school, including the clergyman of the parish, became desirous that it should be transferred to the School Board of *London*, and accordingly they took the necessary steps to obtain the transfer under the 23rd section of the Act. The provision is a general one; but

in this case the transfer is to be made to the School Board of *London*. Now there are various clauses inserted in this section for the protection of those who are interested in the schools in respect to which any arrangement for a transfer has been proposed. One very material and proper one is the following: "The Education Department shall consider and have due regard to any objections and representations respecting the proposed transfer which may be made by any person who has contributed to the establishment of such school." That means a person or body. Accordingly, the *National Society*, having a great objection to this transfer, did appear before the Education Department of the Privy Council, and the Education Department decided not to interfere in any way to restrict the transfer. Then in July, 1872, this information was filed. But the transfer having been executed it was thought proper by the *National Society* that they should come before the Court as Plaintiffs, and raise the general question whether such transfers as this could be made without their consent. Accordingly they filed their bill on the 16th of November, 1872. It raises the general question, and inasmuch as what I am now deciding will apply to most of the schools connected with the *National Society*, it is a question of the highest possible importance. Now, since the trust deed of 1867 contains no provision making the consent of any person necessary for the validity of a transfer, I have to determine whether, assuming that all managers of the school concurred in this transfer, it was necessary for them to obtain any other consent. The various restrictions of the 23rd section are mainly relied upon. There is, first of all, the general provision empowering managers to make arrangements with the school boards for transferring schools. [His Honour then read the first sub-clause of sect. 23, and continued:—] This has been complied with; but the Plaintiffs rely chiefly upon this proviso: "Provided that where there is any instrument declaring the trusts of the school"—there is such an instrument here—"and such instrument contains any provision for the alienation of the school by any persons, or in any manner, or subject to any consent, any arrangement under this section shall be made by the persons in the manner and with the consent so provided." In this instance the deed declaring the trusts of the school contains no provision

V.-C. M. 1874 NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON. ATTORNEY-GENERAL v. ENGLISH.

for the alienation of the school by any persons, or in any manner, or subject to any consent, and consequently the provision is, in my opinion, clearly inapplicable; and the complete answer to the argument upon that provision is, that it has no application, because the trust deed does not contain that which is required to make the concurrence necessary.

Then Mr. *Cotton* says, with great force, that no doubt all persons connected with the *National Society* would be surprised to find that under this Act of Parliament the Society has no voice in the alienation of those school-houses which have been established in a great degree by means of its own funds, and with which it is so nearly connected that it may be considered their patron and supporter. And it is certainly extraordinary that the Act of Parliament should, as, according to my view of it, it does, give power to the managers of a school to alienate without allowing the *National Society* any voice whatever. But the Society is not altogether excluded. There is the clause providing that "the Educational Department shall consider and have due regard to any objections and representations respecting the proposed transfer which may be made by any person to the establishment of such school." That gave the Society a *locus standi* to appear before the Education Department, of which it availed itself, and the Education Department decided against the objection. That tribunal was established by the Act of Parliament for the purpose of deciding this sort of question, and I think that its decision is final.

I may further say that this 23rd section seems to me to be framed with regard to the best interests of all persons, for here is another clause which has been much relied and commented upon. [His Honour then read the saving clause at the end of sect. 23, and continued:—] That is, where any person over and above the managers has an interest in the school, no transfer interfering with his right can take place without his consent. This is again an instance in which vested interests are protected by the Act of Parliament. It seems to me to be impossible to come to any other conclusion than that the consent of the *National Society* is not necessary to a transfer; and I am not prepared to say that it would have been wise that such a power of vetoing, which would have been a very formidable one, should have existed.

V.-C. M.
1874
NATIONAL SOCIETY v. SCHOOL BOARD OF LONDON
ATTORNEY-GENERAL v. ENGLISH.

On the question of the injustice of transferring schools established for the purpose of educating children in the doctrines of the Church of *England* to school boards, where every particular doctrine is excluded, it should be observed that in this particular case there is a provision for a portion of time on two days in the week being allowed for the children whose school is thus transferred to the School Board of *London*, being educated and brought up in the principles of the Church of *England*, but probably this is not provided in a form very convenient or satisfactory to the *National Society*.

Solicitors: Messrs. *G. A. Crawley & Arnold;* Messrs. *Gedge, Kirby, & Millett.*

PLUMER *v.* GREGORY.

V.-C M.
1874
June 8, 9; *Aug.* 1.

[1872 P. 95.]

Partnership—Joint and Several Liability—Money received by Partner—Ordinary Business of Solicitors—Parties—Non-joinder of Co-partner—Laches.

The Plaintiff, a married woman, and her husband, were clients of *J.* and *W.*, a father and son, who carried on business together in partnership as solicitors. In 1859 the Plaintiff became possessed to her separate use of a sum of £3000, which, in consequence of her husband's pecuniary difficulties, she was advised by the solicitors to invest without his concurrence. On the suggestion of *J.* and *W.* she advanced to them £1300, part of the £3000, which they required for another client to complete a purchase of an advowson, on the security of a written undertaking signed by both to execute a legal mortgage of the advowson to her when the transaction was completed. The Plaintiff subsequently handed the remaining £1700 to *W.*, on the representation by him alone that it would be invested on mortgage of the real estate of another client. In January, 1865, *J.* died, having retired from the business in 1862, and in May, 1865, the Plaintiff was fraudulently induced by *W.* to execute a deed constituting him the sole trustee of the £3000, and empowering him to invest it as he thought proper, without being answerable for any loss. No legal mortgage of the £1300 was ever effected, and in 1868 it was paid off to *W.* under the authority of the deed of 1865, and it and the £1700, which had never been invested, were spent by *W.* He continued to pay the Plaintiff interest on these funds till November, 1871, and died insolvent in March, 1872:—

Held, on bill against the executors of *J.* and *W.*,

(1) That *J.*'s estate was liable to make good the loss of the £1300:

V.-C. M.
1874
PLUMER
v.
GREGORY.

(2) That in consequence of the regular payment of interest by *W.*, laches was not attributable to the Plaintiff for not enforcing her rights sooner:

(3) That the dealing with the £1700 was not part of the regular business of *J.* and *W.* as solicitors, and the receipt of it by one partner alone did not make the other partner liable, and *J.*'s estate was not liable to replace this fund.

During part of these transactions *C.* was also a partner with *J.* and *W.*, but he was not a party to the frauds, and no guilty knowledge was attributed to him:—

Held, that the Plaintiff might proceed against any or all of the parties jointly and severally liable, and that *C.* was not a necessary party to the suit.

Atkinson v. *Mackreth* (1) considered.

THE object of this suit was to establish against the estate of a deceased solicitor the liability to repay two several sums of £1300 and £1700 respectively, alleged to have been advanced to the firm of which he was a partner.

The late Mr. *Jonas Gregory* had for many years carried on business as a solicitor in partnership with his son, Mr. *William Gregory*, under the name of "*Gregory & Son*," and for a short time before his retirement, which took place in 1862, in partnership also with a Mr. *Thomas Clark*, under the altered name of "*Gregory, Son, & Clark*."

One of the clients of the firm was Captain *Plumer*, the husband of the Plaintiff, Mrs. *Jessica Plumer*, and it appeared that he and his family had been on very friendly terms with Mr. *Jonas Gregory* and his family, and left the management of their affairs entirely in the hands of Messrs. *Gregory & Son*. Captain *Plumer* and the Plaintiff placed the most unbounded confidence personally in both father and son.

Captain *Plumer* had been very unfortunate in the management of his property, and by the year 1859 had dissipated a considerable fortune, and was entirely dependent upon his wife's resources.

In April, 1859, the Plaintiff had become possessed of a sum of £3000, to which she was entitled as separate estate; and in consequence of her husband's want of business habits and the claims of his creditors, it was thought desirable that it should be invested without his being consulted in the matter, or even knowing what was the amount of the fund which had come into her hands, and

(1) Law Rep. 2 Eq. 570.

she accordingly left it to Messrs. *Gregory & Son* to find a suitable investment.

About this time Messrs. *Gregory & Son* were engaged in carrying out the purchase of an advowson on behalf of another client, and in order to effect this object they required to be able to deposit a considerable sum of money which was to be secured, after the purchase was completed, by mortgage of the advowson; and it was proposed and ultimately arranged by Mr. *William Gregory* that £1300 of the required fund should be contributed by the Plaintiff out of the £3000 in her hands, and a memorandum was prepared and ultimately signed by both the Messrs. *Gregory*, dated the 14th of April, 1859, which, after reciting the facts as to the intended purchase, and acknowledging the receipt of the £1300 by them, continued as follows:—

"Now, in consideration of the said advance the said *Jonas Gregory* and *William Gregory* do hereby respectively undertake and agree with the said *Jessica Plumer* in manner following, that is to say, that immediately upon the completion of the said purchase they the said *Jonas Gregory* and *William Gregory* will forthwith deposit with the said *Jessica Plumer* all the title-deeds relating to the said advowson, as and by way of an equitable security for the advance of £1300, and shall and will as and when called upon so to do by the said *Jessica Plumer*, execute all proper conveyances and assurances by way of mortgage of the said advowson for securing the said sum of £1300, with all usual powers of sale and other powers, authorities, and covenants for effectually securing the said sum of £1300 and interest thereon at the rate of £5 per cent. by equal half-yearly payments; and the said *Jonas Gregory* and *William Gregory* do hereby further declare and agree with the said *Jessica Plumer*, that in the meantime and until the said mortgage shall have been executed they the said *Jonas Gregory* and *William Gregory* will stand seised and possessed of the said advowson of *Cley* upon trust for the said *Jessica Plumer*, her heirs, executors, administrators, and assigns, as a security for the said sum of £1300 and interest, and shall not, nor will in any manner deal with, charge, convey, or dispose of the same until the said sum of £1300 and interest shall have been fully paid and satisfied."

V.-C. M. 1874 PLUMER v. GREGORY.

The circumstances under which the advance of the £1700 was made were detailed in an affidavit of the Plaintiff in the following words:—

"I mentioned to the said *William Gregory* one evening after I had been dining with him and his wife, that I had a further sum of money in my hands beyond that already advanced by me on the security of the said advance, which I wished to get interest upon. Some weeks after, the said *William Gregory* called upon me, and told me that his firm had a client, Captain *Frederick*, who wanted to borrow some money on land security, and that they were rather short of money at their bankers, and he asked me to let his firm have the money which I had lying idle, assuring me that it would be perfectly safe, and that I should have 5 per cent. upon it; and I thereupon, in consequence of his statements, handed the said sum of £1700 in bank notes to the said *William Gregory*. I believed the representation that such investment of the said sum on mortgage of land of the said Captain *Frederick* (who I was further informed and believed had a large landed estate in *Wales*) would be immediately made, and thoroughly believing that the said *Jonas Gregory* and *William Gregory* were devoted to my interests, I gave no more thought to the matter at that time. I received no security of any kind in respect of the said sum of £1700 before the month of August, 1864."

In the meantime, on the 31st of August, 1862, *Jonas Gregory* retired from the partnership. In the year 1864, however, the Plaintiff, in consequence of the suggestion of a friend, applied to *William Gregory* for information about the state of investment of the £1700, and he stated in answer to her inquiries that he would give her additional security by way of a bond, and he afterwards sent her a bond for £3500, dated the 14th of August, 1864, under his hand and seal alone, conditioned to be void on payment to the Plaintiff of £1700 on the 14th of August, 1869, with interest at £5 per cent. per annum.

The bill alleged, and the Plaintiff in her affidavit stated, that from want of knowledge of business she was ignorant of the nature of the security she obtained by means of the bond.

Jonas Gregory died on the 25th of January, 1865, leaving a

considerable estate, and having by his will appointed two of the Defendants his executors. In May, 1865, the Plaintiff and her husband were induced by *William Gregory* to execute a deed dated the 29th of May, 1865, the contents of which they were not informed, by which certain live and dead stock and other articles purchased by means of the separate estate of the Plaintiff were assigned to *William Gregory*, and he was constituted a trustee of the £3000, and was empowered to invest it in his name as he or the Plaintiff might think fit, without his being liable for any loss occasioned thereby, and he was to hold the stocks, funds, and securities upon which it might be invested upon trust to pay the income to such persons as the Plaintiff might appoint, and in default of appointment to herself for her separate use. And upon trust to pay and transfer the stocks, funds, and securities to such persons and in such manner as the Plaintiff should by deed or will appoint.

No mortgage of the £1300 was ever made to the Plaintiff or her husband, and it was in fact paid off to *William Gregory* in May, 1868, upon the authority of the deed of the 29th of May, 1865. The £1700 never was invested, and both these sums were applied by *William Gregory* to his own purposes.

The Plaintiff was never informed by him or any one else that the £1300 had been paid off, and *William Gregory* continued till the month of November, 1871, regularly to pay her interest at the rate of 5 per cent. on the £3000. *William Gregory* died in March, 1872; and his estate, which was admitted to be utterly insolvent, was represented by *John Gregory*, his brother and acting executor.

The bill prayed for a declaration that the estates of *Jonas Gregory* and *William Gregory* were jointly and severally liable to repay the two sums of £1300 and £1700, with interest at the rate of 5 per cent., and the costs of the suit, and for consequential relief.

The 14th paragraph of the bill stated, and it was admitted by the answer of *Jonas Gregory's* executors, that *Thomas Clark*, at one time a partner in the firm, took no part, except a formal one, in the transactions to which the suit related. *Jonas Gregory's* executors, however, submitted by their answer that *Clark* was a

V.-C. M. 1874

PLUMER v. GREGORY.

necessary party to the suit, and also that if the Plaintiff ever had any claim against *Jonas Gregory* or his estate, such claim had been long ago barred by delay and laches.

Mr. *Cotton*, Q.C., and Mr. *E. Cutler*, for the Plaintiff:—

The evidence in the suit establishes that both the funds making up the £3000 came into the hands of one of the partners on behalf of the firm in the usual course of their business as solicitors. As regards the £1300, it is not necessary to resort to the doctrines of the Court as to making one partner liable for money received by another partner. The signature of both the *Gregorys* to the memorandum makes the original liability of both beyond all question, and it is equally clear that the loss of the fund arose from the neglect of *Jonas Gregory* to procure a legal mortgage of the advowson to the Plaintiff.

The case as to the £1700 is also brought completely within the authority of the recent cases of *Earl of Dundonald* v. *Masterman* (1) and *St. Aubyn* v. *Smart* (2). The Plaintiff was a client of the firm, and was advised by both members of the firm at different times. The £1700 was received by *William Gregory* in the course of the management and settlement by the firm of the affairs of the Plaintiff, who was then their client. It was handed to him instead of being invested by the Plaintiff or her husband, in order that, in pursuance of the advice given by them as her solicitors, it should be invested without the knowledge or participation of the husband.

Mr. *Ilbert* appeared for Captain *Plumer*.

Mr. *Glasse*, Q.C., and Mr. *Waller*, Q.C., for the executors of *Jonas Gregory*:—

The suit is defective for want of parties, and the objection having been taken by the answer, can now be insisted upon. When there are several partners, and it is sought to make one of them liable for money paid to one of the others, all the partners must be joined in a suit for the purpose: *Atkinson* v. *Mackreth* (3). *Clark* is, therefore, a necessary party.

(1) Law Rep. 7 Eq. 504. (2) Law Rep. 5 Eq. 183; Ibid. 3 Ch. 646.
(3) Law Rep. 2 Eq. 570.

Mr. *Cotton*, on the question of parties:—

In *Atkinson* v. *Mackreth* (1) the objection was that the partner who had received the money was not made a party. It is not suggested that *Clark* had any share in the transactions complained of, or even any knowledge of them. This is a case of joint and several liability, and either of the parties so liable may be sued without joining the other.

Mr. *Glasse*, in reply:—

Atkinson v. *Mackreth* was not quite a case of first instance. The point was substantially covered by *Coppard* v. *Allen* (2), which was referred to during the arguments.

SIR R. MALINS, V.C.:—

I am of opinion, with great respect for the late Master of the Rolls, that either the decision of *Atkinson* v. *Mackreth* must be considered to have proceeded upon its special circumstances, or it cannot be brought within the settled rules of the Court. In my opinion, where there is a joint and several liability, all or any of the parties liable may be sued without joining the remainder. So it was decided, as I consider, positively, in *Gray* v. *Lewis* (3), but inferentially also in *St. Aubyn* v. *Smart* (4), where a fund had been misapplied by one of two solicitors carrying on business in partnership, and in a suit against the other partner alone he was made liable to repay it. *Atkinson* v. *Mackreth* would have been clearly in point in *St. Aubyn* v. *Smart*, and I think the parties would have cited it if they had considered it as laying down a general principle. I think, therefore, that in the absence of any very special circumstances all or any of persons jointly and severally liable may be sued.

Mr. *Glasse*, Q.C., and Mr. *Waller*, were then heard on the merits:—

It is not denied that *Jonas Gregory* originally incurred some

(1) Law Rep. 2 Eq. 570.
(2) 2 D. J. & S. 173.
(3) Law Rep. 8 Eq. 526.
(4) Law Rep. 5 Eq. 182; Ibid. 3 Ch. 646.

V.-C. M. 1874 PLUMER v. GREGORY.

liability. This original liability was to obtain a legal mortgage on the advowson, and if no loss has been sustained in consequence merely of the neglect to perform that engagement, then the original liability is discharged by the subsequent conduct of the Plaintiff in trusting *William Gregory* alone. The loss was really occasioned by the execution of the deed of the 29th of May, 1865, which was an authority to the mortgagor to pay off the mortgage on the receipt of *William Gregory* alone.

The transactions relating to the £1700 were the acts of *William Gregory* alone, and in respect to them *Jonas* never incurred any liability at all. It is only as to acts which come properly within the regular business of a solicitor that one partner can be made liable for the default of another, and receiving the money of clients for the purpose of obtaining investments is not part of the ordinary business of a firm of solicitors: *Harman* v. *Johnson* (1); *Bourdillon* v. *Roche* (2); *Coomer* v. *Bromley* (3). The question here is really which of two innocent parties should suffer for the default of a third, and parties who have by negligence caused the success of a fraud have no right to special consideration by the Court. If favour is extended at all it ought to be to those who are entirely free from any share in the transaction. In protecting *Jonas Gregory's* estate all grounds of defence may be fairly taken, and the laches of the Plaintiff is a complete defence. She might have enforced her claim long ago, and having waited so long must be considered to have lost any title to the assistance of the Court.

Mr. *Macnaghten* appeared for the executor of *William Gregory*.

Mr. *Cotton*, in reply :—

The borrowing of the £1300 was clearly the act of both the partners, and it was really part of one transaction which comprised the investment of the whole of the £3000. The liability, therefore, of both the partners must extend to the whole fund.

(1) 2 E. & B. 61. 17 Jun 1896 (2) 27 L. J. (Ch.) 681.
(3) 5 De G. & Sm. 532.

Aug. 1. SIR R. MALINS, V.C., after stating and commenting on the facts, continued:—

With regard to the £1300, I do not see a single circumstance to discharge *Jonas Gregory* from the liability to the Plaintiff which he undertook by the memorandum of agreement of the 14th of April, 1859. It was clearly his duty to see that the money was repaid to the Plaintiff, and that duty he overlooked. His joint debtor continued to pay interest upon it down to November, 1871, and there is, therefore, no ground for the defence set up by the answer of the executors, that if the Plaintiff ever had any claim against *Jonas Gregory* or his estate, such claim had long ago been barred by delay and laches. There must, therefore, be a declaration that the estate of *Jonas Gregory* is liable to repay this sum with interest at 5 per cent. from the last payment of interest made by *William Gregory* in November, 1871.

The question as to the £1700 depends upon different principles. It being clear that *Jonas Gregory* never received any part of this sum, and that he was wholly ignorant of the fact of his son having received it, he can only be liable for it on the ground that his partner's receipt for it was his receipt, or in other words, that it was a partnership transaction. It is clear that one partner has no authority to bind the other partners by borrowing money, unless it is borrowed in the usual course of business and for business purposes. These principles are clearly established, I think, by the two authorities which were cited: *Harman* v. *Johnson* (1) and *Bourdillon* v. *Roche* (2). *Harman* v. *Johnson* is a case frequently cited, and is a very valuable authority, because the case is one in which a sum of £1670 was paid to one of two partners without the knowledge of the other. They were, as in the present case, solicitors. The question, which was raised upon an action against the other partner, came on for trial before Lord *Campbell*, who directed the jury that the other partner was liable, inasmuch as the receipt of money by *Smith*, who was one of the partners, for the purpose of its being laid out on mortgage, would be an act within the scope of the authority which *Smith* had as partner with the Defendants, for that attorneys now, as part of their business, acted as scriveners, that is, in laying out money on

(1) 2 E. & B. 61. (2) 27 L. J. (Ch.) 681.

1096 17 Jur

V.-C. M. 1874 PLUMER v. GREGORY.

security. There was a motion for a new trial on the ground of misdirection, that Lord *Campbell's* direction that one partner was liable for all money advanced to the other was too extensive. The case was argued, and Lord *Campbell* himself gave judgment, in which he decided that he had misdirected the jury. He says (1): "I think there should be a new trial. The action is against *Johnson*, who is charged in the character of a partner with *Smith* in the calling of an attorney. There is no evidence going beyond the bare fact of their having jointly carried on the business of attorneys. I think that an attorney, *qua* attorney, is not a scrivener; that his business is to act in a Court of Law, to prepare conveyances, to examine titles, and so on; but not to act as a scrivener. A scrivener has to hold the money put into his hands until he has an opportunity of laying it out; but this employment of scrivener is not a consequence of his character of attorney. The question, then, here is, whether *Smith* was acting within the scope of his partnership authority. If he received the money generally for the purpose of laying it out, he was not acting within his calling of attorney. Attorneys frequently do act as scriveners, in the full sense of the term; but there is no evidence that *Smith* and *Johnson* did so, or that the money received was received for purposes within the object of the partnership. There was strong evidence that *Smith* received the money to be laid out upon mortgage, and that he induced Mrs. *Harman*"—that is, the Plaintiff—"to entrust him with the money by representing that had a security ready; but I cannot say that this was conclusive. And, when I advert to the terms in which I directed the jury, I think that they were too general. For, if the meaning of Mrs. *Harman* was, that a security should be found, and that the money should be left in order to be invested in some mortgage that might be found to be an eligible security, then the business was not to be performed in the character of an attorney. I think, therefore, that the question was left too widely to the jury: it should have been left more pointedly to them, whether the money was placed in *Smith's* hands for the purpose of being advanced on a particular mortgage, or whether it was deposited with him until he could find a proper mortgage. Had it been so left, the jury should have

(1) 2 E. & B. 65.

been told to find for the Plaintiff on the first supposition, and for the Defendant on the second." The other learned Judges concurred in that view, and a new trial was directed.

The same point arose before the Vice-Chancellor *Wood* in the case, also of frequent reference, and I must say of very valuable authority, *Bourdillon* v. *Roche* (1). There it was a trust fund. The facts are short. Under the will of *William Benedict Bourdillon* certain trust moneys were vested in trustees, then represented by the Plaintiffs, upon trusts for investment, and to pay the income to Mrs. *Bourdillon* for life, and so forth. Part of the trust fund consisted of £2000 lent on mortgage to one *Mist*, and in 1828, the mortgagor being about to redeem the mortgage and sell the premises to one *Bailey*, *Roche* recommended that the mortgage money, when paid off, should be re-invested, and to this the trustees assented. The draft of the conveyance to *Bailey* was then prepared and submitted to Messrs. *Roche & Plowman*, who approved thereof, the memorandum of approval being in *Plowman's* handwriting. On the 9th of February the purchase was completed, and then the money was paid to *Roche*, and remained in his hands to be invested. A specific security was at one time mentioned, but there was nothing to shew that the specific mortgage was pointed out at the time when the money was received. *Roche* died insolvent, and the question was, whether *Plowman*, under those circumstances, was liable. The Vice-Chancellor *Wood*, after stating the facts, said it was clear that as to all matters within the ordinary range of partnership business, each partner was the agent of the other, and bound by his acts and representations. He then goes on to discuss what is the extent of the authority of a solicitor, quotes the case of *Viney* v. *Chaplin* (2), which establishes that it is not within the authority of a solicitor to receive purchase-money, nor within his authority to receive mortgage money, and then he puts it thus (3): "There was nothing whatever in the partnership books relating to the transaction, nor anything by which *Plowman* was bound to know of the receipt of the money by *Roche* as a matter of business." After referring to the nature of the evidence by which the case was

(1) 27 L. J. (Ch.) 681. (2) 2 De G. & J. 468.
(3) 27 L. J. (Ch.) 685.

4 Jur. N.S. 619

V.-C. M. 1874 PLUMER v. GREGORY.

attempted to be supported, he says: "If the money were received by *Roche* for the purpose of being invested in this specific security, then, according to *Blair* v. *Bromley* (1) and that class of cases, if those authorities were to prevail, the partner would be bound, but until the matter was brought to an agreement to invest the money on the representation of a specific security, it did not come within the ordinary business of the partnership." He cites *Harman* v. *Johnson* (2), and then decides that the partnership was not bound by the receipt of the money by *Roche*.

Upon these authorities I think it clear that the mere statement that the money was to be lent to a client was not enough to bind the partner. If the firm had been employed to prepare securities for the Plaintiff (because in that case the firm would have had the business transactions, and it would have appeared in their books), a payment of money to one of the partners would have been a payment to both, because it would then have been received for the purpose of being invested on specific security within the meaning of these decisions.

I was much pressed by the Plaintiff's counsel with the decision of Lord Justice *James*, when Vice-Chancellor, in *Earl of Dundonald* v. *Masterman* (3), in which it was held that two partners were liable for the receipt of the third, but it was evident that the decision proceeded on the ground that a firm of solicitors, consisting of three partners, had undertaken the general management of the affairs of Lord *Dundonald*, and that a payment to one was a payment to all in the ordinary course of the business which they had undertaken. My decision in *St. Aubyn* v. *Smart* (4), affirmed on appeal by Lord *Hatherley* (5), which was also cited, proceeded on the same principle.

The payment of the sum of £1700 to *William Gregory* was altogether out of the ordinary course of business, and his partner cannot, therefore, in my opinion, be liable for it. I felt some doubt whether *Jonas* had not given authority to his son by the transaction as to the £1300, but I think it would be going too far if I were to say that an authority by one partner to another to

(1) 2 Ph. 354.
(2) 2 E. & B. 61.
(3) Law Rep. 7 Eq. 504.
(4) Ibid. 5 Eq. 183.
(5) Law Rep. 3 Ch. 646.

borrow one sum of money is an unlimited authority to borrow to any extent. The unbounded confidence of the Plaintiff in *William Gregory* has led her to forego all prudence in the transaction of her business with him, and for that she must suffer. It is a case in which one of two innocent parties must suffer, that is, in which either the persons interested in the estate of *Jonas Gregory*, who was entirely innocent in the transaction, will have the loss thrown on them, or the loss must fall on another innocent party—this Plaintiff. It is due to her negligence and want of prudence in not taking the ordinary course in business, and making some communication to *Jonas Gregory*, or inquiring, at all events, whether the money had gone into the partnership books. Under these circumstances, it is impossible, in my opinion, that I can throw the liability as to the £1700 upon *Jonas Gregory*.

The bill, therefore, must be dismissed so far as it seeks to recover the £1700 from the estate of *Jonas Gregory*. There will be a decree that, the Defendants the executors of *Jonas Gregory* admitting assets, they do repay to the Plaintiff the sum of £1300, with interest from a date to be agreed upon, the amount to be verified by affidavit, and then the bill will be dismissed as to the claim for the £1700. Then comes a question as to the costs. It is perfectly clear that the Plaintiff must have the costs so far as they relate to the £1300, against the estate of *Jonas Gregory*. With regard to the £1700, I think the justice of the case will be met by dismissing the bill without costs.

Solicitors: Messrs. *Radcliffe, Davies, & Cator;* Mr. *William Bohm;* Mr. *P. B. Matthews.*

V.-C. B.
1874
April 21;
June 5, 6, 9.

YOUDE *v.* CLOUD.

[1871 Y. 3.]

Trustee and Cestui que Trust—Negligence of Trustee—Ignorance of the existence of a Trust—Exoneration of Trustee from Liability—Costs.

A testator, who died on the 25th of August, 1839, by his will, dated on the 16th of the same month, made a general devise to two trustees, whom he also appointed executors, of his real and personal estate, upon trust "so soon as possible after" his decease to convert the whole into money, and stand possessed of the proceeds for the benefit of the Plaintiff, his granddaughter, then an infant, and since married to the co-Plaintiff. The only real estate of which he died possessed was the moiety of a public-house, and an adjoining piece of land, and the nature of his interest was a base fee, expectant on the death without male issue of a tenant for life; or contingent on the failure of such issue without the estate in tail male having been barred. One of the trustees died soon after the testator. On the 14th of May, 1849, the tenant for life died without issue, and possession of the property was taken by strangers to the present suit. In April, 1852, the granddaughter attained twenty-one, and the surviving trustee accounted to her for the personal estate, and obtained her release in full of all demands. Afterwards the facts respecting the real estate became partially known to the Plaintiffs, and application was made to the trustee, who said that he understood from the testator that if the testator were to die in the lifetime of the tenant for life the estate would be of no value to him; and that, accordingly, on the death of the testator, he (the trustee) made no further inquiries. Some title deeds were shortly afterwards found and handed over by the trustee to the Plaintiffs; but, as they contended, not until after their claim had become statute-barred:—

Held, as the result of evidence, that the deeds which came out of the trustee's possession were not sufficient to reveal the true state of the title.

The bill was filed against the trustee for an account of the rents and profits of the estate since the death of the tenant for life, and charging wilful default.

The trustee having died, and the suit having been revived against his representatives:—

Held, on the ground of ignorance of the existence of the trust, that the trustee's estate was not liable, and bill dismissed, but without costs.

MOTION for decree.

William Blanch, formerly of the *George Inn, Walham Green*, publican, by his will dated the 16th of August, 1839, after directing his debts and funeral and testamentary expenses to be

paid, and giving some small pecuniary legacies, devised and bequeathed the residue of his real and personal estate to *George Cloud* and *Thomas Nash*, their heirs, executors, administrators, and assigns, upon trust "that they or the survivor of them, so soon as possible after" his decease, should "convert the whole and every part thereof into money," and invest the proceeds, and pay the income for and towards the maintenance and education of his granddaughter *Susannah Lucretia Games*, until she should attain twenty-one or be married; and from and after her attaining twenty-one or being married, stand possessed of the capital upon trust to pay or transfer to her or to such person or persons as she should by deed appoint. In case she should die under age, testator gave the same upon trusts for the benefit of the children of his brother *Richard Blanch*. He appointed *Cloud* and *Nash* his executors.

William Blanch died on the 25th of August, 1839, and his will was proved by both his executors. At the date of his death he was possessed of considerable personal estate.

The only items of real property of which he died possessed were the following:

The will, dated the 8th of August, 1775, of *John Powell*, who died in 1783, contained a general devise of all his manors, messuages, lands, tenements, and hereditaments (which consisted only of the *George Inn*, *Walham Green*, and a piece of land opposite thereto), subject to a term of ninety-nine years, to *John Roberts*, afterwards *John Powell Powell*, of *Quex Park*, near *Margate*, *Kent*, for life, remainder to his first and other sons in tail male, and in default of such issue, in the events which happened, as to one moiety thereof, to *Eliza*, wife of *John Blake*, in tail general, with remainders over; and by an indenture dated the 24th of February, 1829, and made between *John* and *Eliza Blake* of the first part, *John Butt* of the second part, *William Blanch* of the third part, and *William Butt* of the fourth part; and by a fine levied and a recovery suffered in pursuance thereof, the moiety in the hereditaments was conveyed and assured to *William Blanch*. The recital in the indenture relating to the transaction was, that, whereas *William Blanch* had theretofore rendered great assistance to the said *John Blake* and *Eliza* his wife in their respective affairs

V.-C. B. 1874 YOUDE v. CLOUD.

and concerns, in consideration thereof they had agreed to give and assure the said estate tail to *Blanch*, his heirs, appointees, and assigns, and to bar all such estate tail and all remainders over dependent thereon.

Under the above instrument *W. Blanch* was thus at his death entitled in remainder to a base fee, expectant on the death without male issue of *John Powell Powell*, in one moiety of the *George Inn, Walham Green*, and the adjoining premises, and of a piece of land opposite the house, containing 1A. 3R., or thereabouts.

Shortly after the testator's death, *Nash*, the executor, died, having duly accounted to the estate for all his receipts.

On the 14th of May, 1849, *John Powell Powell* died without issue.

On the 4th of April, 1852, Miss *Games* attained twenty-one. Shortly after this date *Cloud* accounted to her for the personal estate of the testator; and, on the 19th of April, 1852, she executed to him a release in full of all actions, suits, claims, and demands.

In September, 1853, Miss *Games* married *William Youde*.

In November, 1870, Mr. and Mrs. *Youde*, through their solicitors, Messrs. *Cobb & Southey*, applied to Mr. *Cloud* for information on the subject of Mrs. *Youde's* claim to one moiety of the *George Inn*, and on the 25th of November, 1870, *Cloud* wrote as follows:—

"In answer to yours of the 24th, I can only give you the same information as I have to Mr. *Youde* repeatedly; that Mr. *Blanch* told me that if he was the longest in this world it would have been a good thing for him; if not, he should lose the benefit of it. Mr. *Butt* was his friend and confidential, and he told Mr. *Nash* and myself the same."

Other letters followed, but no further information was obtained; and on the 28th of January, 1871, the bill was filed by Mr. and Mrs. *Youde* against *George Cloud*.

The bill alleged that *Cloud* having, as executor, taken possession of a box containing the deeds, removed it to his own house, where it remained; that shortly after *Powell's* death, and whilst the female Plaintiff was still an infant, Mrs. *Peacock*, a daughter of *Richard Blanch*, having met *Cloud* at *Walham Green*, informed him of *Powell's* death without issue, and called his attention to the

great value which the documents had thereby acquired; and that *Cloud* replied he thought they were of no great value, and that the testator had asked him to lend money on them, but he (*Cloud*) could not see his way to it. Further, that in 1868, or 1869, for the first time, the Plaintiff, Mrs. *Youde*, was informed accidentally, in conversation with Mrs. *Peacock*, of her claim under the will, and the inquiries were instituted which led to this suit.

The bill alleged that upon the death without issue of *Powell* the Defendant *Cloud* ought to have entered into possession or receipt of the rents of the moiety, and to have sold the same, in conformity with the trusts of the will; that he neglected his duty as trustee; and that he allowed persons who had no right or title to enter upon the property and to remain in undisturbed possession for more than twenty years, whereby the Plaintiffs became barred by statute of all right and interest in the moiety, and the rents and profits thereof.

The bill prayed for an account of the testator's real estate, and of the rents and profits and proceeds of sale thereof received, or which but for the wilful neglect and default of *Cloud* might have been received, by him, and of the application of such of the same as had been received by him, and for payment; and that, in taking such accounts it might be declared that *Cloud* was liable for the rents and profits from the death of *Powell* to the date of taking the account; and for inquiries and accounts.

The piece of land opposite the public-house was now built upon, and had considerably increased in value since the testator's death.

On the 4th of April, 1871, *George Cloud* put in an answer to the bill. He said he had no recollection of ever having seen any such deed as that of the 24th of February, 1829. He had in his possession for some time two parchment documents belonging to the testator, one of which, as he was informed and believed, was a chirograph of a fine levied by *John Blake* and *Eliza* his wife; and the other, as he was informed and believed, was an official extract of the record of a recovery suffered by the said *John Blake* and *Eliza* his wife. Shortly after the testator's death Defendant's co-executor, *Nash*, who was then living at *Walham Green*, handed over to him, the Defendant, a box belonging to the testator, of which *Nash*, had taken possession, and which, to the best of De-

V.-C. B. 1874 YOUDE v. CLOUD.

fendant's recollection and belief, contained only the following documents:—The testator's will, the chirograph of the fine, the official extract of the record of the recovery, a partially executed lease, and some books relating to the testator's business. He remembered the official extract, which was on one skin of parchment, with a large seal in a tin case attached, and he remembered the chirograph of the fine, which was on two small pieces of parchment, folded up inside the extract. He had no recollection of ever having had in his possession or seen the deed in the bill mentioned of the 24th of February, 1829, which he had been informed was on five or six skins of parchment.

Testator told Defendant that he had a deed under which, if he lived longer than a certain Mr. *Powell*, it would be a good thing for him; but if he died before *Powell*, it would be no use. This took place in the presence of Mr. *Butt*, who confirmed what the testator said. The testator never told the Defendant what property he referred to, nor what was the value of it.

Defendant took the above documents in the box to his house at *Hammersmith*, until he removed to *Dorking*, in 1846. He did not himself examine the documents, but submitted the same to his solicitor, Mr. *Le Pipre*, who advised him that they did not, under the circumstances, give any property to the testator, and that he, the Defendant, ought not to spend any money with regard to the property mentioned in them.

Defendant denied the statement about the conversations with Mrs. *Peacock*, and admitted that he never entered into possession or receipt of the rents and profits of the moiety and premises, nor took any steps to prevent any claimants adverse to the will from taking possession on *Powell's* death, or from remaining in undisturbed possession thereof for more than twenty years afterwards.

He further said, that when Miss *Games* executed the release, he handed to her, as he then believed, all the documents above mentioned, except the bar and omnibus account books. In 1867 he removed from *Dorking* to *Brighton*, and then sent to his son, *Thomas Amelius Cloud*, for safe custody, a box containing deeds of his (Defendant's) own, he (Defendant) retaining the key. Defendant had been informed by his son that about the end of 1868 the Plaintiffs called upon him and informed him that they had

found an entry in a family Bible relating to a sum of £1500 connected with the name of *Blake* in 1829; that they requested Defendant's son to make inquiries of Defendant, that he did so, and that Defendant wrote in answer, as the fact was, that he knew nothing of any such sum. Shortly afterwards Defendant had occasion to refer to the contents of the box, and sent the key to his son. His son had informed him that in looking through the bundle of counterpart leases and other deeds, he found the official extract of the recovery tied up with the bundle, and having two slips of parchment, being the chirograph of fine, inside.

Defendant further said he was quite unable to understand how the deed of the 24th of February, 1829, came into the possession of the Plaintiffs. His (Defendant's) son had told him that he handed the two last-mentioned documents to the Plaintiff *William Youde.*

On the 20th of November, 1871, the Defendant, *George Cloud*, died, whereupon the bill was, on the 17th of June, 1871, amended, and on the 27th of May, 1872, re-amended, against his executors and trustees, *George Cloud* and *Thomas Amelius Cloud.*

The bill as re-amended prayed that the Defendants might admit assets, or for administration.

A large body of evidence was gone into, with the results stated in the judgment; the principal issue of fact being whether the deed of the 24th of February, 1829, was ever in the possession of the deceased Defendant.

Mr. *Kay*, Q.C., and Mr. *T. C. Wright*, for the Plaintiff:—

Upon the production of the chirograph of the fine,

Mr. *Jackson*, Q.C. (Mr. *Shebbeare* with him) for the Defendants, objected to the reception in evidence of a document which did not appear to have on it any solicitor's name or other mark or memorandum of verification.

They also objected that the exemplification of a recovery could not be received in evidence without production of the original record. It might be that a deed of this age would prove itself, or could be read in evidence under the provisions of the 14 Geo. 2, c. 20, ss. 4, 5, but an exemplification was not a deed.

V.-C. B. 1874

YOUDE v. CLOUD.

The VICE-CHANCELLOR overruled both objections, holding that both documents were admissible in evidence.

Mr. *Kay*, Q.C., and Mr. *Wright*, in continuation:—

Upon the evidence our contention is, that this deed of the 24th of February, 1829, came to us out of the late *George Cloud's* custody, and was not delivered to us until August, 1869, more than twenty years after *John Powell Powell's* death, when our right to sue had become statute-barred.

Supposing, however, the view of the Court should be, that the deeds were delivered to us in March instead of August, 1869, two months before the twenty years had expired, this is such a degree of negligence on the part of a trustee as the Court will punish: *Lewin* on Trustees (1); *Caffrey* v. *Darby* (2); *Devaynes* v. *Robinson* (3); *Grayburn* v. *Clarkson* (4).

The duty of the trustee was to have sold at *Powell's* death. He should have been as vigilant respecting this estate as an ordinary man would have been with respect to his own property.

Mr. *Jackson*, Q.C., and Mr. *Shebbeare*, for the Defendants:—

Whatever relief the Plaintiff may be entitled to, at least he cannot claim from us rents and profits that we have never received. The very utmost the Plaintiff can claim is, that the value of this estate be estimated as it was at the death of *Blanch*, the testator. That is the utmost the Plaintiff can be charged with, and with interest, if any, at 4 per cent. only: *Imperial Mercantile Credit Association* v. *Coleman* (5). The nature of the estate was a base fee in remainder, expectant on the death of a tenant for life without leaving male issue; or contingent on the failure of such issue without the estate in tail male having been barred; and in any inquiry as to value, the circumstance must be taken into consideration that the conveyance was by a married woman, at her husband's instigation, without value. This the trustees were directed to sell "as soon as possible" after the testator's death. Suppose the late *G. Cloud* had attempted to sell in *Powell's* lifetime, how much would he have got for this property?

(1) 5th Ed. p. 236.
(2) 6 Ves. 488.
(3) 24 Beav. 86, 95.
(4) Law Rep. 3 Ch. 605.
(5) Law Rep. 6 H. L. 189, 209.

3 Jur. N.S. 707

Moreover, *G. Cloud* was misled by the erroneous statements of *Blanch* himself as to the nature of the title; and the estate of an executor cannot be held responsible for the *laches* of his own testator: *Fry* v. *Fry* (1).

G. Cloud was released by the Plaintiffs; and though the release would not be good against fraud, or if obtained by undue influence, it is sufficient to protect the releasee against acts or defaults of mere ignorance. It will be said that the release was confined to personalty; but in truth the release extended to all acts of trusteeship.

No knowledge of the existence of the deed of February, 1829, is brought home to the late *George Cloud;* and the Court of Chancery has never made a trustee liable in respect of a trust of which he had no knowledge: *Selby* v. *Bowie* (2).

Mr. *Kay*, in reply, referred to *Maitland* v. *Bateman* (3); *Anonymous* (4).

SIR JAMES BACON, V.C.:—

The arguments in this case having been concluded, I must say it is one of no small difficulty; for whilst I should be very sorry to relax in any degree the wholesome rules by which the Court of Chancery requires from trustees a strict and punctual, as well as an honest discharge of their duties; I should be, if possible, more sorry if, in enforcing those rules, I went one iota beyond what the strict justice of the case and the strict performance of those rules require me to do.

The trustee in this case, that is to say, the estate of the trustee (for he himself has been dead some time), is sought to be made liable because he did not, upon the death of the testator, who died in the year 1839, or at some other period after that, and when the supposed right might have been made available, convert that estate, or take possession of it, if he did not convert it. The Plaintiff's contention is, that the trustee having neglected to do so, his estate is liable to make good all the loss that has been sustained; and if the law is so, no doubt the law must prevail. But in order to

(1) 27 Beav. 144.
(2) 9 Jur. (N.S.) 425.
(3) 18 L. J. (Ch.) 273.
(4) 31 Beav. 310.

V.-C. B. 1874 YOUDE v. CLOUD.

ascertain that, it is necessary to examine very minutely the circumstances which are involved in this litigation.

There has been no case referred to, and according to my experience my belief is that no case can be found, in which a trustee, however formally he may have been appointed, however extensive may have been the powers that were conferred upon him, has been held liable for the non-performance of a trust of which he was ignorant; and I should be very much surprised to find that any such case had ever occurred, or that any such decision had ever been pronounced against a trustee under such circumstances.

The Defendant's case here is, that whatever be the Plaintiff's right, whatever interest she took in the estate in question, he was wholly unacquainted with it; and that contention on his part is met by the Plaintiff by shewing, first, that by certain deeds which are mentioned there was a reversionary interest vested in the testator at the time of his death, that he had communicated to persons in his lifetime that he had an interest in the estate in question, and that the Defendant must be taken to have known that the testator had that interest; and, moreover, that the late trustee, having in his possession certain muniments of title which would shew the extent and nature of the testator's interest in that estate, must be taken to have been fixed with plain knowledge, not only that it was his duty to convert the whole of the testator's real estate, or to take possession of it, but also that he should be fixed with knowledge that this particular property was included in the conveyances which were in his hands.

Now all that is said upon the subject of the testator's communication to the trustee is read from the answer of the deceased Defendant; and it is remarkable that all that he says the testator ever said to him was, "If I survive *Powell*, it will be a good thing for me—I shall have an interest in some estate," not pointing out which estate, because, although this conveyance and deed which lead the uses of the recovery relate to the *George* public-house of which the testator was the occupant, and in which he lived and died, I do not find a trace in any part of the evidence that, when the testator was speaking to the trustee, or when he was speaking to Mrs. *Peacock*, who is one of the oldest of the witnesses, he ever mentioned, or that they derived any knowledge from any com-

munications of his, that the *George* public-house was the subject of the conversation between them. In the answer of the Defendant, at page 6, he says, "He on one occasion only spoke to me respecting any reversionary property of his. According to the best of my recollection this was on the occasion when he asked me to be his executor. He told me that he had a deed under which (if he lived longer than a certain Mr. *Powell*) it would be a good thing for him, the said *William Blanch*, but if he died before Mr. *Powell*, it would be of no use. This took place in the presence of the said Mr. *Butt*, who confirmed what the said *William Blanch* so said. The said *William Blanch* never told me what property he referred to, nor what was the value of it. According to the best of my recollection, I never saw the said *William Blanch* after the above mentioned conversation, as he died about nine days after he made his will." Now Mrs. *Peacock* was the housekeeper and nurse of the testator. She is a witness for the Plaintiff, and she was examined at very great length, and cross-examined. She says she went to live with the testator in 1834; so that she had five years' acquaintance and experience of him as a person living in his house, he having died in the year 1839. She says, "He never spoke to me about his affairs at all. He never spoke to me about his property. He said he should come into some property through the *Blakes* at the death of *John Powell Powell*—nothing more. He never told me what that property was. I never asked him what the property was. I did not know till after his death that he was going to leave me anything. So far as I knew, all his property at his death consisted of what he would be entitled to through the *Blakes*, and what his business and omnibus and horses fetched. I never knew whether the property he was to come into through the *Blakes* was land or money, or of what it consisted. He told me that the deeds I gave him, as stated in my affidavit, were the deeds by which he should come into the property." Then, in her affidavit, she describes an event which occurred upon a day shortly before his death, he lying upon his death-bed and being incapacitated from any other exertion except that which he was then engaged in. He had some deeds brought to him. She gave him the key, and he took out of the box some deeds, and when it was opened she saw that one had a seal with green wax upon it. How she came to

V.-C. B. 1874 YOUDE v. CLOUD.

see that I do not know, unless the box was open, nor do I think it necessary to inquire; she says the deed consisted of several skins of parchment, but what it was, or what it related to, she does not pretend to say, nor does anybody else; and yet this was at a time when the testator was talking about his property, and talking to a woman who, if the present Plaintiff had died, would have been entitled to the reversionary gift contained in his will, and who was his nurse and housekeeper, and therefore had a certain degree of confidence and communication with him. He, being the landlord of the *George* public-house, does not tell her that the property he was speaking of had anything to do with the *George* public-house. That is an important remark. I refer to it only to see whether the Plaintiff's charge, that the Defendant, the trustee, must have been acquainted with the property which was included in the devise to him, can be sustained by any of the circumstances that have been adduced in evidence, and I do not find a particle of evidence of it. I find every fact in the case which is not in dispute totally at variance with the notion that Mr. *Cloud*, deceased, ever knew that he had anything to do with the *George* public-house, or that he had any duty to discharge in respect of the late testator's real estate; for I find that until the year 1852 —that is, from 1839 to 1852—when the Plaintiff attained her age of twenty-one years, Mr. *Cloud* seems to have been her only protector. He sent her to school, and paid all her expenses, not out of his own money—I do not mean that—but he accounted to her for those expenses. She was brought up in his family, she was companion and friend of his children, and when she married and had children of her own, the children of both families seem to have been on the most friendly and intimate terms with each other; and during all this time there is not the trace nor the suggestion of any interest in the *George* public-house. Mr. *Cloud* is shewn by unquestionable evidence to be a man who took an interest in this young woman, and who discharged his duty as trustee in every respect except this which is in question, if this be an exception, in an exemplary manner. The husband had her fortune with her; and upon her attaining twenty-one years, the trustee gave a full account of it, and she gave the trustee a release. That release is not now impeached, nor is there the slightest colour of suspicion

thrown upon it, and I have no reason to believe that he did not behave in a most punctual, scrupulous, and charitable way on her behalf. Then I am asked to believe that this man who took care of her interest, resulting in transferring to her £600 of stock, was so utterly regardless of her interest, that he let this freehold estate slip through his fingers for want of merely looking after it. I can come to no such conclusion. I think every fact in the case shews the contrary. I find that the Plaintiff is in possession of a certain Bible. How she came possessed of it, does not appear. The Bible contains an entry about *Blake's* bonds, and a further memorandum that he is under obligation to Mr. *Blanch*. When that came into her possession, I do not know. If I take it only from the year when she attained twenty-one, she knew from that time all that that entry would communicate to her, but at no time till 1868 had there been any inquiry made of what had become of *Blake's* bonds, which purported to relate to a sum of £1500, or whether he, Mr. *Cloud*, could give the Plaintiffs any information respecting them, and the inquiries then made were not addressed directly to Mr. *Cloud* but to his son. What conclusion can I draw from that, but that they knew perfectly well that no claim could be made—that it was all moonshine? It was not worth talking about. It is shewn that *Youde* was in direct communication with the son; and yet not one word is said about the *George* public-house. The testator, the public-house keeper, and *Cloud*, the landlord of the public-house, were people whose attention must have been directed to such a subject as this; and yet there is no trace in any part of the case of any mention being made by any human being, not even by Mrs. *Peacock*, who was the confidential housekeeper, up to 1839 —who for thirty years after that never took the trouble to look after, nor to inquire what had become of the female Plaintiff (for it is not till 1869 that they accidentally come together again), and then it was in consequence of something that Mrs. *Peacock* had said to Mrs. *Youde* upon the subject of the deeds, that this inquiry seems to have been instituted.

Now, considering the case with all the attention I can give to it, I fail to see any reason to lead me to believe that Mr. *Cloud* ever knew that he had any duty to discharge in respect of this real estate. I find none. If he had that deed of February, 1829,

V.-C. B. 1874 YOUDE v. CLOUD.

in his possession, he could hardly be acquitted of all blame, by reason of the circumstances I have been narrating. But had he that deed? In my opinion there is not a particle of evidence upon which I can safely conclude that he ever saw the deed. It rests solely upon the evidence of Mr. *Youde*, the Plaintiff. There is no other evidence of it whatever; and when that evidence comes to be examined, contradicted as it is by the evidence on the part of the Defendant, I can find nothing safe from which I can conclude that, either on the day in March or on the other day in August about which there is a conflict, the deed in question passed from the hands of *Thomas Amelius Cloud* into the hands of Mr. *Youde*. If I were to conclude that that was so, I must do it from circumstances which admit of no other conclusion. No doubt in this case, as in all other cases in which circumstantial evidence is admissible, it must be evidence of the strongest and clearest demonstration; but then the test, as I always take it to be, is this, the circumstances put together must be such as will exclude any presumption to the contrary. I do not find that this case answers that test. I find it admitted that Mr. *Youde* and Mr. *Cloud* did look over the deeds in question. They were things of which these men had not any previous knowledge. They were such in shape and appearance, according to Mr. *Cloud's* statement, as would at once attract their attention. The chirograph of the fine and the extract of the recovery deed with the large seal in a box at the end of it, would be things that ordinary men would look upon with some surprise. But these things were produced, and these things by themselves would give no information either to the person who then saw them, or to the trustee or anybody else unacquainted with legal matters and legal proceedings, nor even to them, without some other help. The description of the parcels, and the chirograph of the fine and extract from the recovery, give no such information as would enable anybody to tell what they related to. If the deed had been there it would have done so. The Defendant in his answer says he has no recollection of ever having seen the deed. The way in which the deeds which were in his possession were found is proved by the evidence of *Thomas Amelius Cloud*. He says positively that he delivered those deeds on the day in March—that is to say, on a certain day in March—

namely, the fine and recovery deed and an old lease which was produced. He delivered them with no others to Mr. *Youde*. Mr. *Youde* agrees that *Cloud* did deliver to him what he called a parcel of deeds. They are at variance whether the deeds were in a brown paper parcel or whether they were simply tied up together, or put into a black leather bag which Mr. *Youde* had then with him. Then what became of Mr. *Youde* and the brown paper parcel that Mr. *Youde* had with him? The parcel is carried down to *Kingston*, it is laid upon the table, and Mr. *Youde* goes out of the room with a strict injunction to his wife not to open it. His back is no sooner turned than a sort of family assembly takes place. There are the children and there is a child who is staying there with the family. They are all present and his wife opens the parcel; and then, to make assurance more sure, it is carried upstairs to a bed-ridden old woman in order that she might see what the parcel contained. They say it undoubtedly contained a parchment consisting of many skins, but there is no other evidence. I think that part of the case is over proved. I am not satisfied with it. If I were satisfied that the deed was produced, I am not satisfied as to where the deed came from. At the testator *Blanch's* death, *Nash* had possession of the box for some short time; then it went into Mr. *Cloud's* possession, and that is all that I know about it; and the whole case turns upon what Mr. *Youde* says took place in *London* when certain deeds were delivered to him. If the deed of February, 1829, was then delivered to him, it would go far to prove that it had probably been in the possession of Mr. *Cloud*. Against the affidavit and the answer of Mr. *Cloud*, and against the affidavit of the son, I am not at liberty to believe that he ever set eyes upon that deed, or that it ever passed from the possession of Mr. *Cloud* to that of Mr. *Youde*, although it is in the possession of Mr. *Youde* at this moment. That, in my opinion, is a thing that is necessary to be ascertained before I can make a decree fixing this trustee with any liability in respect of that which is complained of. To the discrepancies in the statement about the months of March and August I pay very little attention. The evidence on either side is worth very little. I give each side credit for saying what they believe upon the subject. I do not rely upon what the wander-

V.-C. B. 1874 YOUDE v. CLOUD.

ing victualler says, who is sometimes in one place and sometimes in another, and who, three or four years after the event, swears to half-past four o'clock. That does not make any impression upon me. I do not take the trouble to inquire into it because it is not worth while. Whether it was in March or in August, I think, is an immaterial fact; but the material fact is, that, whenever it was, there was a time at which *Thomas Amelius Cloud* delivered to Mr. *Youde* the deeds left in his father's possession, and he swears what they consisted of. There was time enough between that and the production, and the display on the table and the opening of the parcel at the meeting at *Kensington*, to change the nature of the contents of the parcel, if it was a parcel; or to add to the contents of the bag, if it was a bag.

It becomes unnecessary, therefore, for me to consider the other point, which, if I did not take the view I have expressed on the first point, it would be necessary to consider, namely, what is the extent of the liability of the trustee. I mean with reference to the construction of the will; and as I do not find it necessary to decide anything upon that subject, I will not trust myself to express any opinion upon the matter; but as I think the Plaintiff's case, depending solely upon that deed, fails of satisfactory proof, I think his bill must be dismissed. But as I cannot find any reason or excuse for the trustee in his lifetime not having handed these things over, or done something about the recovery-deed and the fine—whether they were worth anything or nothing—not having given any particular information upon that subject to his *cestui que trust*, I dismiss the bill without costs.

Solicitor for the Plaintiffs: Mr. *H. P. Cobb.*
Solicitors for the Defendants: Messrs. *Watson & Sons.*

SMITH *v.* DANIELL.

V.-C. B.
1874
July 9.

[1869 S. 262.]

Practice—Production of Documents—Privilege—Cases and Opinions of Counsel, and of an ex-Chancellor.

16 B. 143

From copies of letters written before the litigation by a Plaintiff to one of the Defendants, it appeared that the former had taken, 1, opinions of counsel, and, 2, the friendly opinion of Lord *Westbury*, then an ex-Chancellor, on points which afterwards became part of the subject-matter of the litigation.

Plaintiff, in answer to an application to produce these opinions and the cases on which they were founded, objected, on the ground that "they were written in anticipation of and in relation to the litigation." He did not say they were confidential communications:—

Held, that he was bound to produce both classes of documents.

ADJOURNED SUMMONS on the part of the Defendant *John Westwood*, the Secretary of the *East India Irrigation and Canal Company*, the members of which were co-Defendants, that, notwithstanding the objection raised by the Plaintiff, *John Thomas Smith*, to produce the documents thereinafter mentioned, the Plaintiff might be ordered to produce the same.

The bill was filed on the 18th of December, 1869, and was afterwards amended. The object of the suit was to set aside an award or apportionment which purported to have been made by a committee, consisting of four members, of the company, and was signed by the Defendant *John Henry Daniell*, as chairman of such committee. The subject of the award was a sum of £50,000, which had been paid to the company by the Secretary of State in Council, for the purchase of their undertaking. One of the questions in the suit was, whether the award was not rendered invalid by reason of the non-concurrence in it of the Defendant *Peters*, one of the members of the committee, with the other three members, who were the Defendants *John Daniell*, *George William John Repton*, and *Matthew Wood*. Another question was, whether the Plaintiff was, or was not, an officer of the company.

The Plaintiff being called upon to make an affidavit as to documents, did so in May, 1871, but objected to produce certain letters

V.-C. B. 1874 SMITH v. DANIELL.

written by the Defendant *Peters* to him, and certain copies of letters written by him to the Defendant *Peters*. This objection, however, was overruled, and upon the correspondence being produced, the following passages were found:—

In a letter written by the Plaintiff to the Defendant *Peters*, dated the 6th of November, 1869, he said: "I will see if I can get the papers for an opinion of counsel about the *quorum*." In another, from the same to the same, dated the 9th of November, 1869, the writer said: "In the meantime I have consulted another lawyer, who was recommended to me as being (and he appears to be) a very clever man, on the subject of three members of the committee forming a legal award. He himself was decidedly of opinion that the award must be unanimous, but I have instructed him to obtain for me counsel's opinion from a Q.C. of unquestionable eminence. He expects I shall have it on Friday or Saturday. I will gladly take other opinions on any points which are held against my claim." In a third, from the same to the same, dated the 15th of November, 1869, the writer said: "I have just received an excellent legal opinion, fortified by proofs of cases, to the effect that, in the present instance, the award of the committee must be unanimous. Also, that the consulting engineer of the company is 'one of its officers' for this distribution." Again, in a letter of the 19th of November, 1869, the Plaintiff said: "I wrote to you on the to say that I have had the opinion of an eminent counsel (Mr. *D.*) on various points connected with my case, and it was in all respects highly satisfactory." . . . . In a letter of the Defendant *Peters* to the Plaintiff, dated the 24th of November, 1869, the latter case and opinion were referred to.

These cases and opinions formed the first class of documents referred to. The second class consisted of an opinion of the late Lord *Westbury*, and the case on which the opinion was founded. This opinion was thus referred to in a letter of the 27th of November, 1869, addressed by the Plaintiff to the Defendant *Peters*: "Further, I have had the great advantage of my case being investigated, and an opinion (private) by Lord *Westbury* upon it. As he says you ought to be kept fully informed upon all points, I must tell you in private (never to be made use of or mentioned in

any way) what he says, and when I have an opportunity I will shew you his note on the subject."

On the 22nd of April, 1874, an order was made, on the application of the Defendant *Westwood*, that the Plaintiff do within four days make a full and sufficient affidavit, stating whether he had or had had in his possession or power the case and opinion referred to in the letter of the 9th of November, 1869, and the other cases and opinions above mentioned.

The Plaintiff, by an affidavit filed on the 29th of May, admitted that he had the above documents in his possession, but claimed to have them privileged from production, "on the ground that they were written in anticipation of and in relation to this litigation."

Upon this, the above summons was taken out on the 20th of June.

Mr. *Jackson*, Q.C., and Mr. *Millar*, in support of the summons:—

Technically the objection is informal, as not stating on whose behalf the cases were drawn and the opinions given.

The rule as laid down in *Greenough* v. *Gaskell* (1), the leading authority, is, that the privilege extends only to communications between a party and his professional adviser, "when acting in that capacity, and in the ordinary course of business:" *Daniell's* Chancery Practice (2).

With respect to the former class of documents, the Plaintiff does not say they were confidential; he merely says they were written "in anticipation of and in relation to litigation." But this is no longer a ground of privilege: *Minet* v. *Morgan* (3), where Lord *Selborne* reviews the cases, and upholds the later doctrine on this subject. For anything that appears, these opinions may have been taken and given for the purpose of being laid before the common judge of the Plaintiff and Defendants.

As to Lord *Westbury's* opinion, at that date Lord *Westbury* had ceased to be the legal adviser of any one but the Crown. His Lordship was not Colonel *Smith's* "professional adviser, acting in that capacity, and in the ordinary course of business," accord-

(1) 1 My. & K. 98, 115. (2) 4th Ed. vol. i. p. 526.
(3) Law Rep. 8 Ch. 361, 368.

V.-C. B. 1874

SMITH v. DANIELL.

ing to the rule laid down in *Greenough* v. *Gaskell* (1). Hence the opinion is not privileged.

Mr. *Eddis*, Q.C., and Mr. *Speed*, for the Plaintiff:—

The object of the suit is to set aside the award; the points being two,—one that one of the members of the committee having dissented from the rest, the award is not the award of all the members, and is on that ground invalid; the other, whether the Plaintiff was, properly speaking, an officer of the company at the time.

These opinions were plainly taken by Colonel *Smith* for his own purpose, and for the purpose of advising *Peters* on his behalf. Nothing could be more confidential than papers of this kind; and it may be admitted at once that, according to *Minet* v. *Morgan* (2), as cited by the other side, and *Macfarlane* v. *Rolt* (3), before the late Vice-Chancellor *Wickens*, it makes no difference whether they were taken *ante litem motam* or not. The principles of the rule, as explained in *Greenough* v. *Gaskell* (4), are precisely applicable here; viz., that the rule is made "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources." In *Ross* v. *Gibbs* (5), the privilege was extended to communications with an unprofessional agent; in *Cossey* v. *London, Brighton, and South Coast Railway Company* (6), it was extended to reports made before action or litigation of any kind, by the medical officer of a company to the company, against whom a claim had been made by a man and his wife, who alleged that they had been injured in a railway accident.

As to the opinion of Lord *Westbury*, if his Lordship chose as a friend to place himself in the situation of a professional adviser to the Plaintiff, which no one can dispute his right to do, how can his opinion be distinguished from that of an ordinary counsel?

(1) 1 My. & K. 98, 115.
(2) Law Rep. 8 Ch. 361, 368.
(3) Ibid. 14 Eq. 580.
(4) 1 My. & K. 103.
(5) Law Rep. 8 Eq. 522.
(6) Ibid. 5 C. P. 146.

Lawrence v. *Campbell* (1); *Bunbury* v. *Bunbury* (2); *Lafone* v. *Falkland Islands Company* (3).

SIR JAMES BACON, V.C.:—

I do not think that the Plaintiff's affidavit claims the privilege upon any of the grounds mentioned in the cases which Mr. *Eddis* has cited. He does not say that these were confidential communications. He says that they were written "in anticipation of and in relation to this litigation." The materiality of these documents cannot be pronounced upon at present, but they are not claimed as being confidential; it is scarcely denied that they are material to the subject of the suit; and, if I were to form any guess, which it would be wrong to do except for the purpose of the observations I am now making, I should say that, according to the general tenor of the letters themselves, the opinions must be material to the questions at issue in the suit; for the letters are communications to *Peters*, who is Defendant in the suit, of the advice which Colonel *Smith*, the Plaintiff, has taken upon the very subject of the award, as to the materiality of a certain number of arbitrators forming a quorum and being parties to an award. I am quite willing to agree, and am very glad to find that I am supported by some of the more recent cases, that, if the communications have been confidential, and have been made for the purpose of getting advice in order to sustain the Plaintiff's case, they would not be produced as of course; but that the matter would require investigation before they were ordered to be produced. I think there is nothing of the sort here. I am speaking now of the letters mentioned in the first part of the schedule, and they refer to cases and opinions, the substance of which has been already communicated to a Defendant in the suit, upon the very subject-matters which are in question in the suit. The question whether Colonel *Smith* was an officer of the company or what position he occupied, must of necessity be included in the matters which are there mentioned. I cannot think, therefore, that there is any ground, on the authority of the cases that have been referred to, for exempting these documents from production. The case of *Cossey* v. *London*,

(1) 4 Drew. 485. (2) 2 Beav. 173.
(3) 4 K. & J. 34.

V.-C. B. 1874 SMITH v. DANIELL.

Brighton, and South Coast Railway Company (1) has been referred to, which related to the production of a report made by a medical officer which stated the result of his examination of a person alleged to have been injured in a railway accident; but that stands on a different footing.

Then as to the case laid before Lord *Westbury*, I cannot consider it in any other light than as a statement made by the Plaintiff to a friend of his. Lord *Westbury's* great qualifications are not in question; but that it was not a professional communication is clear on the face of it. Lord *Westbury* did not, when he expressed an opinion, express it in discharge of any professional duty. The old rule was that, unless the communication was made strictly in a professional capacity, the privilege could not attach; and I recollect instances, and there are plenty to be found, where that rule has been carried to a very rigorous extent. One instance I remember was where a man had been taken up on a charge of a capital offence and was tried, and upon the trial a man was proposed to be put in the box to give evidence. The objection was taken that the communication made to the witness, which he was about to prove, was a confidential communication. He was one of those men who hang about police-offices and represent themselves to be attorneys; but it was clear he was not an attorney. The objection as to his disclosing the confession—for it amounted to that—which the person charged had made to him, was set aside, and he was compelled to give evidence. I do not say that such a rule prevails at this time, and certainly not in this Court; but upon the materials before me, it is clear that in the discharge of some office or other—with reference to some question in the suit—the Plaintiff did communicate to one of the Defendants that he had taken these opinions. I think he is bound now to produce them, in order that the others may see what they are; and as to Lord *Westbury's* opinion, I cannot think it probable that there was anything confidential in the nature of it.

The order will be for production in the terms of the summons.

Mr. *Jackson* asked for the costs, the Plaintiff having failed on both contentions.

(1) Law Rep. 5 C. P. 146.

Mr. *Eddis* suggested that they should be costs in the cause.

V.-C. B.
1874
SMITH]
v.
DANIELL.

SIR JAMES BACON, V.C.:—

I think it was not at all an unfair thing to discuss in Court. The costs will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Wilkins, Blyth, & Marsland.*
Solicitors for the Defendants: Messrs. *Ashurst, Morris, & Co.*

In re BONELLI'S ELECTRIC TELEGRAPH COMPANY.

COOK'S CLAIM.

V.-C. B.
1874
July 9.

Practice—Petition—Service on Respondent out of the Jurisdiction.

Where a respondent to a petition was out of the jurisdiction, the Court made an order for substituted service, and also gave leave to the petitioner to serve the respondent abroad.

MOTION.

The Petition was presented in the matter of the *Trustee Relief Act* (10 & 11 Vict. c. 96), and of the claim of *Henry Cook* in the winding-up of *Bonelli's Electric Telegraph Company, Limited*, for advances to the company.

The Petitioner now moved that he might be at liberty to serve a copy of the Petition upon *Louis Copin* at *Paris* or elsewhere in the Republic of *France*. *Copin* was the syndic or assignee in the bankruptcy of *Henry Cook*, and was said to be residing in *France*.

A clerk of the solicitor of the Petitioner, in an affidavit, stated his belief that if substituted service of the Petition were made upon a solicitor in the city of *London* whom he named, it would come to the knowledge of *Copin*.

Mr. *Macnaghten*, in support of the motion:—

The power of the Court to order service of the copy of a bill upon a Defendant out of the jurisdiction is conferred by Cons. Ord. x., rule 7; *Drummond* v. *Drummond* (1); *Morgan's* Chancery Acts and Orders (2).

(1) Law Rep. 2 Ch. 32. (2) 4th Ed. p. 424.

V.-C. B. 1874 *In re* Bonelli's Electric Telegraph Company.

The Order does not in terms extend to petitions, but from *Seton* on Decrees (1) it appears that service of a petition upon a respondent abroad has been ordered by the Court.

Some difficulty, however, has been felt in consequence of a remark attributed to the Master of the Rolls in *In re Maugham* (2).

Cook's Claim.

Sir James Bacon, V.C.:—

What you require is satisfactory evidence that the Petition has come to the person who is named as a Respondent to it.

You may take the order for substituted service upon the solicitor, and also for service on Mr. *Copin* out of the jurisdiction.

Solicitors: Messrs. *Parkin & Pagden.*

V.-C. B. 1874 *Aug.* 1.

In re BONELLI'S ELECTRIC TELEGRAPH COMPANY.

COOK'S CLAIM (No. 2).

Company—Winding-up—Severance of part of the Assets—Payment into Court—Costs, Charges, and Expenses of Liquidators.

Where, in the winding-up of a company, part of the assets has to be severed from the rest to answer the claim of a creditor, upon which claim there are many incumbrances, and an arrangement has been come to between the incumbrancers, and sanctioned by the Court, rendering necessary the presentation of a petition and the appearance of the liquidators on the petition, they having paid the money into Court:—

Held, that the liquidators are entitled to their costs of appearing on the petition, out of the fund in Court, but not their costs, charges, and expenses of investigating the claims, or of an abortive attempt at arrangement.

PETITION.

In the course of the winding-up of *Bonelli's Electric Telegraph Company, Limited*, it was found by the liquidators that a sum of £4062 8*s.* 5*d.* was due from the company to *Henry Cook*, and that there were several incumbrances on this fund.

The liquidators accordingly paid the sum into Court, where it was now represented by a sum of £4358 8*s.* 1*d.* Consols standing in their names.

(1) Pages 35, 1245. (2) 22 W. R. 748.

In their affidavit, filed on the 28th of May, 1874, they stated the existence of this claim, and that the several incumbrancers had, after an abortive attempt, come to an arrangement of their claims upon the fund, which arrangement had received the sanction of the Court.

They then said as follows:—"We have incurred divers costs, charges, and expenses in the investigation of the several claims to the trust fund, and in and about the said abortive arrangement, and we submit that these ought to be paid out of the trust fund."

The Petition was presented by one of the incumbrancers, making the liquidators Respondents, setting forth the above affidavit, and praying that, after payment of the costs of the Petitioner and of the Respondents, the liquidators, the fund might be transferred to the Petitioner, with other relief, framed so as to carry out the arrangement.

The only point was as to the prior costs charges and expenses of the liquidators.

Mr. *Macnaghten*, for the Petitioner:—

The liquidators are not entitled to any costs charges and expenses of investigating the claims, or of the arrangement which failed.

In *In re Webb's Policy* (1) stakeholders were held entitled to their costs of appearance as between solicitor and client, but not to any charges and expenses.

It has become necessary to separate this sum of consols from the general assets, but that does not justify the throwing of these costs charges and expenses upon this fund.

Mr. *Kekewich*, for the liquidators:—

Any costs, charges, and expenses of the liquidators which may now be severed by the Court from the other costs payable out of this fund, will have to be borne by persons who are not at all interested in the particular fund.

The company are solvent, and were before the payment into Court, and now are, ready to pay all the charges of the liquidators.

If the liquidators had deducted these costs from the moneys

(1) Law Rep. 2 Eq. 456. 12 Jur N.S. 595.

V.-C. B. 1874 *In re* Bonelli's Electric Telegraph Company. Cook's Claim. (No. 2.)

paid in, the Court probably would not have made any distinction between these costs and the rest.

Mr. *Graham Hastings*, for another Respondent.

Sir James Bacon, V.C.:—

Any costs charges and expenses which may have been incurred before the payment into Court are the liquidators' own affair, and they have no right to throw them on this fund.

The liquidators' costs of appearing on this Petition will of course come out of this fund, but no other costs.

The order will be as prayed.

Solicitors: Messrs. *Parkin & Pagden;* Messrs. *Deane, Chubb, & Co.;* Mr. *Trinder.*

V.-C. B. 1874 *July* 25.

In re CODRINGTON'S CHARITY

Practice—Lands Clauses Consolidation Act, 1845—*Charity—Payment to Secretary.*

Order for investment of the proceeds of lands belonging to a charity, which had been taken under the *Lands Clauses Consolidation Act*, 1845, and payment until further order of the interest to the secretary, and to his successors the secretaries for the time being, of the trustees of the charity, of which there was no treasurer.

Lands belonging to the *Bristol Municipal Charities* were taken by the *Bristol and Portishead Pier and Dock Company*, and the purchase-money, represented by a sum of £1956, had been paid into the bank.

The Petitioners, who were the surviving or continuing trustees (appointed by an order of the Lord Chancellor, dated the 12th of June, 1852, and by an order of the Charity Commissioners, dated the 27th of September, 1865,) of the *Bristol Municipal Charities*, by their Petition prayed an investment of the £1956, and that the interest on such investment might, until further order, be paid to *F. W. Newton*, the present secretary of the trustees, and to his successors the secretaries for the time being of the trustees.

Mr. *Roupell*, in support of the Petition.

V.-C. B.
1874
In re CODRINGTON'S CHARITY.

THE VICE-CHANCELLOR expressed some doubt as to making an order for payment to the secretary only, but on the production of similar orders—one made in relation to this charity—and on being informed that there was no treasurer, made the order in the form prayed.

Solicitors: Messrs. *T. White & Sons.*

MERCHANT BANKING COMPANY *v.* MAUD.

V.-C. B.
1874
July 31.

[1867 M. 63.]

Repayment of Amount of Judgment—Interest.

Persons who by the order of an inferior Court have been improperly compelled to pay money to their opponents in the suit, are, upon the reversal of such order by a Court of Appeal, entitled to have the amount repaid with interest at 4 per cent. from the time of payment.

UNDER an order of the Lord Chancellor, dated the 19th of December, 1870, reversing an order of Vice-Chancellor *James*, dated the 24th of February, 1870, the sum of £2580 2*s.* 4*d.* was paid by the Defendants to the Plaintiffs on the 9th of March, 1871. By an order of the House of Lords, dated the 22nd of June, 1874, the order of the Lord Chancellor was discharged.

Mr. *W. F. Robinson*, on behalf of the Defendants, now moved that the order of the House of Lords, dated the 22nd of June, 1874, might be made an order of this Court, and that the Plaintiffs might be ordered on or before the 10th of August, 1874, to pay to Defendants the sum of £2133 1*s.* 8*d.*, the balance of £2580 2*s.* 4*d.* paid to Plaintiffs on the 9th of March, 1871, pursuant to the order of the Lord Chancellor of the 19th of December, 1870; interest at £5 per cent. from the 9th of March, 1871, up to the 10th of August, 1874, upon the amount paid to the Plaintiffs, to be repaid by Plaintiffs, being included in the sum claimed by Defendants under their present application.

V.-C. B. 1874

MERCHANT BANKING CO. v. MAUD.

In support of this claim for interest, *Rodgers* v. *Comptoir d'Escompte de Paris* (1) was cited, as establishing the principle that persons who by the mistake of an inferior Court have had their money improperly taken from them are entitled to have the money restored with interest during the time that the money has been withheld.

Mr. *Eddis*, Q.C., for the Plaintiffs:—

The ordinary rule of this Court is, that where money paid under an order or decree has, on appeal, been ordered to be repaid, the repayment is without interest: *Parker* v. *Morrell* (2). All that *Rodgers* v. *Comptoir d'Escompte de Paris* decided was that a direction for payment of interest on the amount of the judgment ought, pursuant to the practice of the Courts in *India*, to have been given by the Supreme Court of *Hong Kong* as incident to the Order in Council; but that case in no way affects the general rule of this Court. In any case the rate of interest claimed is excessive.

SIR JAMES BACON, V.C., said that the rate of interest claimed, £5 per cent., was excessive, and that £4 per cent. only could be allowed. On the main question, however, he adopted the decision of the Privy Council as laying down a just and reasonable rule which ought to prevail in all cases. The amount must, therefore, be repaid with interest at £4 per cent.

Solicitors: Messrs. *Champion, Robinson, & Poole;* Messrs. *Flux & Co.*

(1) Law Rep. 3 P. C. 465, 475, 476. (2) 2 Ph. 453.

In re ROYAL VICTORIA PALACE THEATRE SYNDICATE.

V.-C. B.
1874
July 16, 18.

MOORE & DE LA TORRE'S CASE.

Unregistered Company—Winding-up—Circular—Representation by Promoters—Contributories to the Extent of the Representation—Companies Act, 1862, *ss.* 199, 200.

14 L.T. 343
669.

An undertaking having been set on foot for the purchase and alteration of a theatre, a partnership consisting of more than seven members was formed for the purpose. Two of the promoters, being members, issued a circular, in which was contained the following statement:—

"The entire remodelling, redecorating, and furnishing will cost £12,000, and of this sum £5000 only remains for subscription."

The partnership having been ordered to be wound up, as an unregistered company, under the 200th section of the *Companies Act*, 1862:—

Held, that the two promoters must be settled on the list of contributories for all the balance of the unsubscribed-for capital, up to £12,000.

ADJOURNED SUMMONS.

On the 9th of December, 1873, an association called the *Royal Victoria Palace Theatre Syndicate*, having been held to be a partnership, and consisting of more than seven persons, and being unregistered, was ordered to be wound up under the 199th section of the *Companies Act*, 1862.

In the course of the winding-up, the Chief Clerk, at the instance of some of the contributories, directed the official liquidator to bring in a supplemental list, treating two persons named *Charles Moore* and *Romaine De la Torre* as contributories for a sum of £6550 under the following circumstances:—

Moore & De la Torre, who were co-partners, were the promoters of the above undertaking, the object of which was the purchasing of the *Victoria Theatre*, in the county of *Surrey*, and the conversion of it into a theatrical music hall. They collected some subscriptions, and in or about July, 1871, issued a circular signed *Moore & Co.*, the name of their firm, which was headed "Private and Confidential."—"*Royal Victoria Palace*," and contained, amongst other paragraphs, the following:—

"The great success which has attended the *Alhambra Palace* as

V.-C. B. 1874

MOORE & DE LA TORRE'S CASE.

a place of entertainment has induced a few friends to enter into arrangements to provide the *Surrey* side of *London* with a similar establishment. . . . .

"The entire remodelling, redecorating, and furnishing on a magnificent scale will cost £12,000, and of this sum £5000 only remains for subscription.

"When the above is completed, it is arranged to form a joint stock company, to be called the '*Royal Victoria Palace, Limited*,' with a capital of £50,000 for its purchase and working.

"The price of £40,000 at which it will be sold to the company, will, for each £100 forming the £12,000 above-mentioned, enable a return to be made of £300 less a small percentage for expenses. . . . .

"This is neither a speculation nor an investment, but the purchase of a property on most advantageous terms, with a certainty of sale at a very handsome profit."

At the foot of the circular was printed the following form of receipt:—

"*Royal Victoria Palace,*

"*London,* 1871.

"Received from of the sum of pounds, being one-half of my subscription towards the sum of £12,000 for the purchase, alteration, redecorating, and refurnishing the above theatre, in accordance with the statements contained in our circular of the day of , the balance to be paid by me on or before the day of , 1871."

The contention of the contributories who sought to charge Messrs. *Moore & De la Torre* was, that the above statement amounted to a contract by *Moore & De la Torre* that they would take or place the balance of unsubscribed-for capital to the amount of £12,000.

Neither *Moore* nor *De la Torre* was originally placed on the list. *Moore*, however, in an affidavit set out a list of nineteen subscribers, including himself for £100, the total amount of the subscriptions being £5450. It was for the difference between this last-mentioned sum and £12,000 that he and his partner were sought to be charged.

From the evidence filed on behalf of the Respondents it appeared that in March, 1873, a meeting of the *Royal Victoria Palace Syndicate* was held at *Evans'* Hotel, at which it was resolved that the association should, at some future day, be duly registered as *The Metropolitan Theatre Company, Limited;* and that whatever amount should be found due to Messrs. *Moore & De La Torre* as promoters, should be paid in shares and debentures of this future company. Having resolved this, the syndicate proceeded to resolve themselves into a meeting of *The Metropolitan Theatre Company, Limited;* and the persons who signed the memorandum agreed to pay £10 per cent. towards the working expenses of the theatre.

De la Torre offered to submit to be put on the list as co-contributory with *Moore* to the extent of £100.

The matter having been adjourned into Court,

Mr. *Kay*, Q.C., and Mr. *Method*, for the official liquidator, submitted the question.

Mr. *Jackson*, Q.C., and Mr. *Solomon*, for *Moore & De la Torre*:—

The liability of *Moore & De la Torre* for £100 is admitted; if after that there should be any deficiency, it will have to be borne by the members according to some rate of contribution. But no question of deficiency of assets has arisen, hence a supplemental list is at least premature.

It is said that the statement in the circular amounts to a contract—that is to say, an implied contract, for no one can say it is express. If it could be shewn that *Moore & De la Torre* had promised any agent of the other co-adventurers that they would be subscribers for any amount of the capital, that would have been a promise for valuable consideration, for which the promissors would have been liable. But no one comes forward to state this.

[Mr. *Kay* observed that, on behalf of creditors, he must, if necessary, be heard on this point.]

No doubt the creditors must be paid in full. There is no limit to the liability of these contributories; they are liable to the extent of all their assets, and the question is not one in which

V.-C. B. 1874

MOORE & DE LA TORRE'S CASE.

creditors are concerned, as there is no suggestion of deficiency, merely one of contribution between contributories.

No one says, no one can truly say, that he subscribed on the faith of their statement. Even an express agreement to place shares is not equivalent to an agreement to take shares: *Gorrissen's Case* (1). The principle is, that it must be shewn that some one has been injured, in which case he may possibly recover in an action of damages.

In any event, no implied liability can be imputed to Messrs. *Moore & De La Torr*, after the proceedings at *Evans'* Hotel in March, 1873, which amounted to an entire re-construction of the association, and cancellation of the existing mutual claims of its members.

Mr. *Eddis*, Q.C., and Mr. *T. A. Roberts*, for the other contributories:—

We do not say the clause means an agreement to place shares. It is an invitation to subscribe on the faith of a statement that £7000 has been subscribed for, and only £5000 remains to be subscribed for.

Suppose the undertaking had been successful, can it be doubted that *Moore & De la Torre* would have demanded profits in the ratio of seven to five.

Gorrissen's Case was wholly different. Mr. *Gorrissen* undertook to place shares. In this case *Moore & De la Torre* state that capital "has been" subscribed; a statement which they are bound to make good, and which they can make good only in one way.

Cases more in point are, *Henderson* v. *Lacon* (2), and *Carew's Case* (3); and the case is stronger where the association is an unregistered company under the Act of 1862.

[They also referred to *Pickard* v. *Sears* (4); *Rawlins* v. *Wickham* (5); *Duchess of Kingston's Case* (6), and cases there cited; *Davies' Case*, before the Lords Justices, March 15, 1872.]

(1) Law Rep. 8 Ch. 507.
(2) Ibid. 5 Eq. 249.
(3) 7 D. M. & G. 43.
(4) 6 A. & E. 469.
(5) 3 De G. & J. 304.
(6) 2 Sm. L. C. 6th ed. 679.

Mr. *Jackson*, in reply :—

The acts of the parties negative the notion of anything like an understanding to contract.

SIR JAMES BACON, V.C.:—

This case has been discussed at great length; but, in my opinion, it is one which does not present any very serious difficulty.

The order which has been made is for the winding up of a partnership, because an unregistered company is only to be considered as an ordinary partnership; and it comes within the scope of the *Companies Act*, 1862, because the number of persons composing it is larger than that mentioned in the Act.

Now section 200, to which reference has been made, is as plain in its terms as can possibly be. The words are: "In the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs." That is to say, it is the most ordinary partnership.

The question before me is, how is that partnership constituted; and, for present purposes, it is originated by what is called this circular letter, which, as I read it, is a very plain invitation on the part of *Moore & De la Torre*, who had stipulated that they should be managers of the partnership, and who were the managers of the partnership, to other persons, to whomsoever it might be addressed, to come and join in the partnership, for the purpose there mentioned. The capital is expressed to be £12,000. That is the invitation: "Come in as many of you as will, and join the partnership, the capital of which is to be £12,000; £7000 of that has been already collected, and there remains only £5000: you who contribute the £5000 will be partners in the same proportions as the existing partners." The words of the circular are really not open to any question in my opinion. "The great success which has attended the *Alhambra Palace* as a place of entertainment has induced a few friends to enter into arrangements to provide the *Surrey* side of *London* with a similar establishment. . . . The

V.-C. B. 1874

MOORE & DE LA TORRE'S CASE.

lease," and so on, "will cost £12,000, and of this sum £5000 only remains for subscription. When the above is completed,"—then it says what is to be done; and a form of receipt is annexed to that proposal, which is in these terms:—[His Honour read the form, and continued:—] Can there be any doubt, then, that from the moment any person answers that invitation, and subscribes any sum of money, he becomes a partner in the concern, of which already the capital consisted of £7000, and to which £5000 was to be added? I cannot conceive that any doubt exists upon the subject, or that there is any reason to question what was done. If any other intention had been in the mind of Messrs. *Moore & De la Torre*, who are the inventors and originators of this plan, it ought to have been expressed in the circular. There is not a word in the circular which throws the slightest doubt upon it. They are the inventors, they are the instigators, the managers; they have the power all in their own hands, and they deal with the thing throughout.

Now, the law upon the subject is very plain and distinct. *Rawlins* v. *Wickham* (1) is a case which has a nearer affinity to this than perhaps any other. There a partnership contract had been entered into, upon certain representations that the assets consisted of so and so, and the liabilities were so much, and so on; and the intending partner engaged to come in upon the invitation there held out, and upon the representation there made. It turned out that the representations were erroneous. Then what was the consequence? The man who made them was held bound to make good the representations upon which he had induced another person to enter into obligations. If the concern had been going on, no doubt there were two modes in which the persons who had by the misrepresentation been induced to subscribe might have been relieved. They might have said, "The representation is untrue, and we will have the contract rescinded;" or they might have said, "The representation must be taken to be true, and you must fulfil your part of it." That is out of reach now, because the winding-up order has reduced the term of this partnership to one and to only one kind of remedy *inter se*. In the words of the statute, their equitable rights must be ascertained and arranged in Chambers. Messrs. *Moore & De la Torre* say that they were agents

(1) 3 De G. & J. 304.

in this matter, and that only a subscription of £100 had been made. They never said that until after the event has happened in which their liability is to be ascertained. Before that, they were the managers of this partnership, and they had a right to say to the subscribers and to all the world, "In the proportion of seven to five, this is our concern." If it had been successful, would there have been any ground why the subscribers for £5000 could say that they were entitled to more than the profits, however large they might have been, than the proportion which five leaves to seven? How could they dispute the right of Messrs. *Moore & De la Torre* to the other seven shares of the copartnership? What the amount of liability may be, it is not for me at present to say, and I have not heard it argued at present. Whatever that may be, these persons, partners in a trading concern—for trading concern it is—buy a lease, fit up a theatre, and so on, and whatever liabilities there may be they must bear them *inter se* as partners. Their interests in it are as clear to my mind as the liability which I have mentioned.

Then it is said that this has been condoned; that the state of things has been altered by what took place at the meeting at *Evans' Hotel*, in March, 1873. I cannot help thinking that there is not the slightest foundation for that assertion. What took place was this: they had formed what they called "a syndicate," a word which I do not receive with great favour, because I have known it to be applied to cases which might be called by a much more significant expresssion than that; but, however, that is the appellation which these gentlemen bestow upon their undertaking; it was necessary to find money on their taking possession of the theatre, and for furnishing it and carrying on the business until they should find a purchaser for it. The money was wanted, and the syndicate, that is the persons, the partners, agree in the first place that if the meeting shall sanction the formation of a company, then whatever amount was found due to Messrs. *Moore & De la Torre* shall be paid in shares and debentures of the *Metropolitan Theatre Company*. Messrs. *Moore & De la Torre* having been managers up to that time, it is very reasonable to suppose that some amount was at that time due to them; which, although they were partners, they were entitled to have paid to them out of the

V.-C. B. 1874

MOORE & DE LA TORRE'S CASE.

partnership assets; and the meeting of partners, embodying the whole partnership, agree that that debt, whatever it be, shall be acquitted by the assignment of certain shares in an imaginary company; that is to say, the company which is hereafter to be formed; and Messrs. *Moore & De la Torre* agree to accept the same. Having disposed of that part of the business, the syndicate resolve themselves into a meeting of the *Theatre Company, Limited*, and then they pass certain resolutions, the only important one of which is, that the gentlemen who signed the memorandum agree to pay 10 per cent. towards carrying on the theatre; that is, to continue the partnership in accordance with the terms contained in the circular of February, 1873. What kind of condonation is there in that? On the contrary, the resolutions continue the existing partnership, they provide the means for carrying it on, and the association is dealt with in all respects as if the resolutions had never been passed, and as if the members had found the money in some other way. As I have said, I cannot draw any distinction between this and any ordinary partnership; I mean the essence of a partnership contract, that every member of it is to bear his share of the burden, and to have his share of profits. £7000 had been already collected, as the managers of the partnership say. In my opinion, they must be held to make that statement good. If they can furnish the names of the persons who had agreed to take shares to the amount of £7000, the names of those persons will be inserted in the list of contributories. If not, as £7000 must be inserted in the list, in order to make up the contributories, there are no names but those of *Moore & De la Torre* which can be inserted. They are, in my opinion, wholly prevented from saying that there were not other shareholders. If, on the other hand, they say that there were others, but cannot shew that to be the fact, the consequence no less is that they must say, "We alone were the shareholders." In short, it seems to me as plain as possible that, in carrying the 200th section of the *Companies Act* into effect the official liquidator must treat this as a partnership, the capital of which was £12,000. He has the means of ascertaining who were the subscribers after the issue of that circular, and then he must naturally put those subscribers upon the list. Unless Messrs. *Moore & De la Torre* furnish him with the names of other persons who were

shareholders, he must put their names upon the list; and the liability will accrue in the proportion which seven bears to five.

I think, therefore, that the official liquidator will find no difficulty in performing his duty under the statute; and Messrs. *Moore & De la Torre*, unless they furnish some other persons' names to the official liquidator, must be put upon the list for the proportion which I have mentioned.

The cases referred to do not, in my opinion, except so far as they contain principles, apply in the slightest degree to this case. In one of the cases which has been referred to there was no undertaking to place shares, there was only a limited undertaking beyond which the Lord Justices would not extend the liability of the person who made the promise. Here the consideration is: "Come and join us; here is a very good thing; by subscribing £12,000 we shall make £300 for every £100 subscribed. £7000 has been already collected, and when £5000 more is subscribed we shall go on merrily." The list of contributories must be settled in that way.

If there are other names besides those of *Moore & De la Torre* they must be put on the list of contributories to the relief of *Moore & De la Torre.*

After some discussion His Honour, regarding the question as a mere partnership dispute, directed the costs of all parties to come out of the estate.

Solicitors for the Liquidator: Messrs. *Bolton & Co.*
Solicitor for Messrs. *Moore & De la Torre:* Mr. *J. I. Solomon.*
Solicitors for the other Shareholders: Messrs. *Knox & Mould.*

V.-C. B.

1874

July 6, 7.

In re PARAGUASSU STEAM TRAMWAY COMPANY.

ADAMSON'S CASE.

Company — Cancellation of Contract — Application of Compensation Money in crediting Shares with Payment of Future Calls — Companies Act, 1867, *s.* 25.

10 Ch. 157.
10 Ch. D. 723
12 Ch. D. 853.

A company, being at the time in great pecuniary difficulties and under an onerous contract with *B.*, one of their directors, entered into an agreement with *B.* by which he agreed to annul his contract and give the company the benefit of a more beneficial sub-contract upon receiving £12,000 compensation, which it was thereby agreed should be paid by crediting the shares standing in his name with a payment of £1800 (thereby making the same fully paid up), an acceptance for £200, and the remaining £10,000 in fully paid-up shares, to be issued at certain contingent periods. Within two months after the execution and registration of this agreement, a petition, on which an order was ultimately made, was presented for winding up the company :—

Held, that the effect of the arrangement under which *B.* had applied, in paying up his shares, money legitimately coming to him as compensation for giving up a beneficial contract, was to discharge *B.* from all liability in respect of those shares.

ADJOURNED SUMMONS on behalf of the official liquidator of the *Paraguassu Steam Tramway Company, Limited*, for the purpose of making Messrs. *Adamson, Ronaldson, & Wescott*, the holders of 150 £20 shares in the company, liable for £1800, being the balance of £12 per share alleged to be due from them in respect of their shares.

It was not disputed that £8 per share had been paid in cash on these shares, and the question was whether there had been a valid payment within the requirements of the *Companies Act*, 1867, s. 25, of the remaining £12 per share.

The company was, on the 9th of January, 1867, incorporated under the *Companies Act*, 1862, with a capital of £1,500,000 in 75,000 shares, for the purpose of purchasing and working a concession for the construction of a steam tramway in the province of *Bahia*, granted by the Brazilian Government to a Mr. *J. C. Morgan*.

Messrs. *Adamson & Ronaldson* carried on business in the City as ship and insurance brokers and shipowners, and towards the latter part of 1866, at which time steps were being taken for getting up

a company for the purpose of purchasing and working *Morgan's* concession, they were applied to by *G. F. Griffin*, who had obtained the contract from *Morgan*, to enter into a freight contract for the conveyance to *Bahia* of the necessary plant on condition of taking or placing 500 shares in the intended company.

After some negotiation a contract, dated the 14th of December, 1866, was entered into by which *Adamson & Co.* undertook to supply *Griffin* with tonnage for the conveyance to *Bahia*, at certain specified rates, of the whole plant required, it "being understood" that "the agreement and the rates of freight mentioned apply to the whole of the material and contractor's plant to be shipped for the *Paraguassu Steam Tramroad Company* under the agreement;" and *Griffin* was not to be responsible to *Adamson & Co.* if in consequence of the company not being able to carry out their agreement the quantity shipped was less than therein stated.

It was also agreed that, in consideration of *Griffin* concluding with *Adamson & Co.* this contract, and the company agreeing to confirm and to adopt it in case of *Griffin's* failing to fulfil it, *Adamson & Co.* would subscribe, or get their friends to subscribe, for 500 shares in the company.

On an intimation that he would not otherwise get the contract, *Adamson*, who had at first declined, consented to become a director. In January, 1867, the company was registered; it being provided by the 56th of the articles of association that "the directors shall not be disqualified from being concerned in or participating in the profits of any contract with the company."

The articles also gave the directors power to receive the uncalled capital on any shares in advance of calls.

On the 29th of January, 1867, *Adamson & Co.* entered into a sub-contract by which the firm of *Pothonier, Tilsley, & Co.* undertook, with *Adamson & Co.*, to convey to *Brazil* the plant, &c., required for the operations of the company, at rates considerably lower than those which were to be received from the company by *Adamson & Co.* under their freight contract of December, 1866; and the sub-contractors agreed to apply for, through *Adamson & Co.*, and to accept if allotted, 400 shares in the company. Messrs. *Adamson & Ronaldson* subscribed for fifty shares each, and by thus placing the remaining 400 with the sub-contractors, the requisite

V.-C. B. 1874 ADAMSON'S CASE.

number of 500 shares, which were allotted on the 7th of February, 1867, was made up. Calls to the amount of £8 per share were paid on these shares.

In July, 1867, the contract of the 14th of December, 1866, between *Adamson* and *Griffin* was formally adopted by the company.

Of the 400 shares taken by *Pothonier, Tilsley, & Co.*, *Adamson* agreed at their request to place fifty, and accordingly this number was transferred to Mr. *J. B. Wescott*, in whose name they now stood.

In June, 1869, the company being in a state of great pecuniary difficulty, and finding the contract of December, 1866, disadvantageous, were anxious for a modification of it, and to get the carrying work done at a cheaper rate. *Adamson & Co.* were applied to and consented, upon receiving compensation, a portion of which was to be applied in making the 150 shares held by themselves and *Wescott* fully paid-up shares, to give up their original contract and all claims against the company under it, and to give the company the benefit of their sub-contract of the 29th of January, 1867, with *Pothonier, Tilsley, & Co.*

After some discussion a resolution was passed by the board on the 8th of June, 1869, in effect annulling the freight contract of the 14th of December, 1866, and instead thereof adopting the sub-contract entered into by *Adamson & Co.* with *Pothonier, Tilsley, & Co.* An agreement carrying out the terms of this resolution was executed on the 23rd of June, 1869, by which it was provided that *Adamson's* contract of December, 1866, under which it was recited that his firm had "the exclusive right" of conveying plant and material for the company, should be cancelled, and that the consideration for such cancellation should be the sum of £12,000, payable as follows:—

As to £1800, part thereof, in cash; as to £200, by the acceptance of the company to the draft of *Adamson & Co.* payable at *Bahia* sixty days after sight; and as to £10,000, the residue thereof, by allotting to *J. W. Adamson* and *Ronaldson*, or their nominees, 500 fully paid-up shares of £20 each: the issue of these shares to be postponed until certain specified additions had been made to the capital of the company; and it being provided that

in the event of the company being wound up before the whole of the 500 shares should have become issuable, *Adamson & Co.* should not be entitled to rank against the estate of the company as creditors for any part of the £10,000 which should not, at the date of the winding-up, have been discharged by the issue of shares as provided. On the receipt of the £1800, *Adamson & Ronaldson* were to apply the same in payment up of the unpaid subscriptions on the 150 shares registered and standing in the names of themselves and *Wescott*. It was also provided that the company should adopt the sub-contract made by *Adamson & Co.* with *Pothonier, Tilsley, & Co.*, and indemnify *Adamson & Co.* from all liability under such sub-contract.

A copy of this agreement was, on the 24th of June, 1869, registered with the Registrar of Joint Stock Companies, pursuant to sect. 25 of the *Companies Act*, 1867. The 150 shares standing in the names of *Adamson, Ronaldson*, and *Wescott* were credited, by an entry in the cash-book of the company on the 23rd of June, 1869, with £1800, "the amount paid them as compensation for relinquishment of their freight contract, as per agreement of even date" therewith, and the 150 shares now appeared in the books of the company as fully paid-up shares.

The company did not recover its position, and on the 20th of August, 1869, a petition was presented, and on the 22nd of January, 1870, the petition having stood over from time to time, an order was made, for winding up the company.

The official liquidator, by his summons, impeached the arrangement of June, 1869 (by which the 150 shares standing in the names of *Adamson, Ronaldson*, and *Wescott* were credited with £1800, thereby making them fully paid-up shares), on the ground that the cancellation of the contract of December, 1866, was made at a time when, as shewn by the evidence, the company was hopelessly in difficulties and practically insolvent (though, as was alleged, an appearance of solvency was attempted to be given by payments into the company's banking account by the directors, who afterwards drew out the amount by cheques signed by them and purporting to be in respect of their unpaid fees); and that the arrangement was a mere device concocted between the directors and carried out by a *malâ fide* exercise of their powers for the pur-

V.-C. B. 1874

ADAMSON'S CASE.

pose of relieving *Adamson* (one of their body), *Ronaldson*, his partner, and *Wescott*, his nominee, from liability on their shares.

Evidence on the other hand had been afforded, by letters from the *London* manager to the manager in *Bahia* and between some of the directors, of the endeavours of the directors, as early as May, 1868, as the only means of saving the company from wreck, to get rid of or modify *Adamson's* very onerous contract, which had been forced upon the company, to their great disadvantage, under an arrangement made by the *concessionaire* previous to the incorporation of the company.

Mr. *Jackson*, Q.C., and Mr. *Ingle Joyce*, for the official liquidator:—

We say that the whole transaction is a fraud, in the sense of being a mere device for the purpose of escaping liability on these shares, concocted between the directors at a time when the company was in a position of utter impecuniosity. All that *Ferrao's Case* (1), relating to the affairs of this company, decided was, that the liability of a shareholder might be discharged, under an arrangement by which his shares were credited, at the request of some third party, a *bonâ fide* creditor of the company, with part of the money payable to him upon the settlement of his claim; that is, that so long as there has been a *bonâ fide* payment of the amount due upon the shares, such payment is not ineffectual from having been made, not by the contributory himself, but by another person on his behalf. Here, however, there has been no *bonâ fide* payment; no real consideration for these shares has passed to the company, and the transaction comes within the definition given by Lord Justice *James* in *Spargo's Case* (2), as "a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament." It was, in fact, a fraudulent preference under sect. 164 of the *Companies Act*, 1862, and the Court has jurisdiction under sects. 101 and 165 to undo the transaction and order a return of money thus improperly paid without a bill being filed for the purpose: *Stringer's Case* (3). In any case, the original freight contract, upon which depends the validity of the agreement of June, 1869, is open to

(1) Law Rep. 9 Ch. 355. (2) Law Rep. 8 Ch. 407, 413.
(3) Law Rep. 4 Ch. 475, 486.

the objection that it was merely one-sided, inasmuch as there was no obligation on the part of the company to employ *Adamson & Co.*, and the recital of it in the agreement of June, 1869, as conferring upon *Adamson & Co.* the exclusive right of freight, &c., is incorrect.

Mr. *Swanston*, Q.C., and Mr. *Cracknall*, for Messrs. *Adamson*:—

The Court is asked by the official liquidator to overrule two recent cases (*Bush's Case* (1), *Ferrao's Case* (2)), deciding what is a sufficient compliance with the provisions of the *Companies Act*, 1867, s. 25, as to the issue and holding of shares and the satisfaction of liability upon them. The correspondence clearly shews the anxiety of the company as far back as May, 1868, to get rid of this contract, which, though very beneficial to *Adamson*, was most onerous for the company. *Adamson* insisted that, if the company wished to get the benefit of this cheap sub-contract, they must compensate him for the loss he would be put to in having to give up his original contract; and in the view of the company it was worth £12,000 to get rid of it. The contract is not one-sided, and it has not been incorrectly recited in the agreement of June, 1869, inasmuch as a contract to carry the goods of the company means the whole of the company's goods, and obliges the company to employ the contractor for that purpose: *Thorn* v. *Commissioners of Public Works* (3). But even assuming the contract to have been one-sided, the company cannot recover money paid by them to *Adamson* for settlement of his claims under it, with knowledge of the facts, even though they were ignorant of the law: *Brisbane* v. *Dacres* (4); *Marriot* v. *Hampton* (5); and the official liquidator has no higher right than the company in this respect.

Mr. *Jackson*, in reply.

Sir James Bacon, V.C.:—

The question is, whether the transaction of June, 1869, amounts to satisfaction—to payment, or what is equivalent to payment—by

(1) Law Rep. 9 Ch. 554.
(2) Ibid. 355.
(3) 32 Beav. 490.
(4) 5 Taunt. 143.
(5) 2 Sm. L. C. 4th Ed. p. 325.

V.-C. B. 1874 ADAMSON'S CASE.

Adamson and the others, of the unpaid calls upon the shares which they then held. The effect of the agreement between the *concessionaire* and *Adamson & Ronaldson* was to engage them to provide freight or shipping for carrying to *Bahia* the materials required for making the railway. The agreement was by no means an incautious one. Everything was particularised with great minuteness. Messrs. *Adamson* thereby undertook, under penalties, to have always ready, at thirty days' notice, the means of transporting the commodities from *England* to *Bahia*—a very onerous undertaking on their part, and by way of addition to the bargain they undertook to subscribe by themselves or their friends for 500 shares. The consideration for the agreement is plain, patent, and open to no question. But then it is said that the agreement is unilateral, and that, though *Adamson & Ronaldson* are bound by it to all the stipulations on their behalf, the company, or rather the *concessionaire*, is not bound at all. I cannot read the agreement in any sense like that, and it is impossible to contend successfully that it is not an agreement on the part of the company that all materials that they shall have for the purposes of their undertaking to send to *South America* shall be sent by means of the shipping which *Adamson & Ronaldson* are to provide. I have not the slightest doubt about the construction of that agreement, or that a violation of it on either side would give cause of action, which might be sustained against the party making default. This agreement having been entered into, and having been approved in the most distinct and clear terms on the part of the company, is acted upon. The 500 shares were taken, and goods to a considerable quantity were shipped on the footing of that agreement, and so matters went on until June, 1869, when came the transaction to which this question more immediately relates. At that time it is clear from the minutes and the correspondence, that the people in *Bahia* were greatly dissatisfied with improvident contracts entered into by the *concessionaire* and transferred by him to the directors ; and, amongst other things, they thought that the terms upon which he had engaged with *Adamson* were excessive, and that they had undertaken to pay a higher price than that for which they could get the work done elsewhere, especially as *Adamson* had made an advantageous sub-contract

with *Pothonier*, who was to do the duty which *Adamson* had undertaken to perform for the company at a much less rate of charge.

It was obvious that a burden rested on the company, from which they would gladly be relieved. After many discussions, they came in June, 1869, to the understanding which is embodied in the agreement—a special, well-considered, and not ill-drawn instrument. Whether it was a good or a bad bargain, I have no means of ascertaining, but that the company thought it so is clear. All that was done afterwards was done in clear accordance with that agreement. There is no concealment, there is no misconception, and I am asked to conclude from this business transaction between the contractor and the company, when they desired to be relieved from the contract, that it is a cloak, a sham, and a trick to relieve the contractor from liability in respect of his shares. There is nothing from which I have found any such thing. Every fact that has been mentioned is without dispute. The correspondence does not suggest any falsehood or trick, and in my opinion this payment was not a fraudulent preference, because there was a good consideration, and sect. 165 in the Act of 1862 does not touch the case I am now considering. It is true that the funds of the company in *England* had fallen to a very low ebb, and affairs in *South America* were not exceedingly flourishing in a pecuniary point of view; but the hopes of the company were not extinguished. I see no suggestion that the company was to come to an end, or inclination on their part to put an end to the work to be done under the contract. On the contrary, the stipulation is that *Adamson* shall relieve the company from the burden which rested on them, and that the company should also have the benefit of the sub-contract entered into with *Pothonier*. If *Adamson & Co.* were entitled to receive compensation, was it not in their power to apply the amount of that compensation—their own money—in payment of the calls on these shares? That is all they did; they desired to be relieved, but not without satisfying their obligations, and when they agreed that upon payment of the £1800 to them they would therewith satisfy their remaining liability on the shares, surely they did nothing unlawful or unreasonable; nor can I understand that there is the slightest difference between this

V.-C. B. 1874 ADAMSON'S CASE.

and *Ferrao's Case* (1). There, as here, there was a demand against the company, payable by the company, and undisputed. Here, by virtue of a contract which is perfectly valid, there is a demand payable by the company. If (in *Ferrao's Case*) Mr. *Webb* had been a shareholder in the company, and had said, "Instead of paying the money you owe me, you shall write it off in respect of my shares," must not the decision have been the same as it was? The introduction of *Ferrao* (a shareholder) made no substantial difference; he was only the nominee of *Webb*. The case is the same here, except that there is no *Ferrao*. *Adamson*, to whom the money is due, says, "I require you to pay that money as consideration for my letting you off this bargain. With that money I shall pay up what I owe on the shares." And so the contract is carried out. No doubt there are circumstances, such as the cheques for unpaid fees, calculated to raise suspicion in the case; but I am not entitled to deal with suspicions merely. I decide on the facts as they stand in evidence before me, and whatever was done in reference to other matters cannot affect this question, which is, whether persons having a valid claim against the company liquidated by agreement between them, can apply the amount, or any part of that amount, in payment of a debt which the creditor would, in the first instance, owe to the company on calls being made when there has been power to anticipate payment of calls which might become due. The case is reduced to this, that unless the agreement with *Griffin* was invalid all that has been done is right. I cannot discover a pretence for saying that there was anything invalid or improvident in it when it was entered into. From December, 1866, until June, 1869, the company had abundant opportunity of considering the nature and effect of that agreement. There is no trace of any complaint, except only that they find they agreed to pay more than they could furnish themselves with the same thing for from another source. For three years the agreement is acted upon, and, as I have said, I can entertain no doubt as to the construction of it. The second agreement only adopts that. It adds nothing to it, for the use of the words, "exclusive right," does not add anything to it. That second agreement embodies the transaction of which I have been speaking, and then for a clear liquidated

(1) Law Rep. 9 Ch. 355.

debt, the creditor to whom that debt is owing, being under an obligation to pay calls, says, "Instead of taking the money from you I desire to have that money placed to my credit in respect of these shares." I can conceive no kind of difference, none in substance and hardly any in words, between this case and *Ferrao's Case* (1).

There is no doubt that *Adamson* had a right to say, "Pay me down on the counter £1800," and the company could have had no answer whatever to that demand. If they had paid it down on the counter (I do not forget that they had no means), *Adamson* might have handed it to the cashier and said, "Enter it on the books to the credit of my shares." What is done is exactly equivalent to that. The books were kept with punctuality. The transaction is recorded in the proper place, and the thing is dealt with in a way perfectly in accordance with the agreement. I see no attempt to shelter or shield Mr. *Adamson*. No particular favour appears to have been intended to him by the directors. Having, therefore, with his own money, as I must consider it after this agreement, paid the calls on these shares, I think he acquitted himself of all the obligations under those shares, and it would be unreasonable to treat his shares otherwise than as paid-up shares, for paid up those shares have been.

Summons dismissed. Costs on both sides out of the estate.

Solicitors: Messrs. *Wansey & Bowen;* Mr. *Rowland Miller.*

(1) Law Rep. 9 Ch. 355.

V.-C. H.
1874
July 2.

WATSON *v.* ROW.

[1871 W. 126.]

Executors Defendants—Joint Retainer to Solicitors—One Executor Debtor to Testator's Estate—Costs of Suit—Costs of Inquiries—Set-off—Taxation.

Two executors, defendants in a suit, gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the Chief Clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—

Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him.

Re Colquhoun (1) and *Harmer* v. *Harris* (2) observed upon.

FURTHER CONSIDERATION.

This suit was instituted against two executors, the Defendants *Row* and *Woodman*, for the administration of the estate of a testator, *William J. P. Watson*. The executors gave to a firm of solicitors a written retainer in the form following:—

"We do require and authorize you to act for us in the above suit."

The retainer was signed by both the executors. The Defendant *Woodman*, who had died insolvent, had been, in taking the accounts, certified to be indebted to the testator's estate. In taking the accounts of the Defendant *Woodman's* debt, certain costs, in addition to the Defendants' joint costs in the suit, had been incurred. It was now asked that a direction should be given to the Taxing Master to make a distinction between the Defendants' costs incurred in the suit, or to separate the Defendant *Woodman's* costs from the Defendant *Row's*, in order that such costs might be set off against the debt due from the Defendant *Woodman* to the testator's estate.

Mr. *Karslake*, Q.C., and Mr. *Kekewich*, for the Plaintiff, submitted that if the Defendant *Woodman* had been the sole Defendant he would not be permitted to have any costs until his debt

(1) 1 Sm. & Giff. App. 1; 5 D. M. & G. 35. (2) 1 Russ. 155.

should be paid, and that, therefore, the costs of the Defendants ought to be separated, and the Defendant *Woodman's* share of them not be paid to him or to his solicitors, but be retained as a set-off against the debt due from him. The Defendant *Row* was liable to the solicitors for all the costs incurred in the suit.

[They referred to and relied upon *Harmer* v. *Harris* (1).]

Mr. *Method*, for an infant in the same interest, referred to *Re Colquhoun* (2).

Mr. *Eddis*, Q.C., and Mr. *C. T. Simpson*, for the Defendant *Row*, also referred to *Re Colquhoun* and to *Fraser* v. *Thompson* (3), and submitted that his conduct had been proper; that he was justified in doing what he had done, and that the costs had been properly incurred. As between him and the firm of solicitors, he was, no doubt, liable for the whole of the costs. No solicitors, having the case of *Re Colquhoun* before them, would have acted upon a separate retainer if the Defendant *Row* had attempted to give one, and if he had refused to join the Defendant *Woodman* in giving a retainer, the Defendants would probably have been left without any legal assistance. They also referred to *Anderson* v. *Boynton* (4) and *Bailey* v. *Birchall* (5).

Mr. *Karslake*, in reply.

SIR CHARLES HALL, V.C.:—

I do not, of course, mean to decide at variance with the decisions in *Re Colquhoun* and *Harmer* v. *Harris*, but those cases do not govern the present case, for the reason that here there is a joint retainer by both the executors, and a joint liability of both in respect of the whole demand of the solicitors. The reports of the case of *Re Colquhoun* leave uncertain whether there was or was not a joint retainer, but I infer from what was stated by the Vice-Chancellor in his judgment, and the statement of the case in 1 Sm. & Giff. App. 1, that there was a separate retainer by Dr. *Ford*. Mr. *Colquhoun* acted on behalf of three other Defendants—

(1) 1 Russ. 155.
(2) 1 Sm. & Giff. App. 1; 5 D. M. & G. 35.
(3) 1 Giff. 337.
(4) 19 L. J. (Q.B.) 42.
(5) 2 H. & M. 371.

V.-C. H. 1874

WATSON v. ROW.

18 Ch D 519

the same solicitor accidentally represented four parties—and the Vice-Chancellor in his judgment said he was not satisfied that if the Petitioners had proceeded at law against Dr. *Ford* they might not have recovered the whole amount of their claim; and he also said, "There was no evidence to shew whether Mr. *Colquhoun* received a joint or separate retainer from the Defendants." There is nothing in the report of the case of *Re Colquhoun* on appeal (1), which is at variance with this view. The certificate there set forth of Master *Follett* was a very exhaustive one. He puts the cases of joint retainer and separate retainer, and in paragraph 15 he states that if the demand were a joint demand, the order might have been discharged by Mr. *Colquhoun* for irregularity. Dr. *Ford* got a separate order to tax upon his separate application. If it had been a joint retainer, that ought to have been discharged, so he treated it as a separate retainer. That being so, the judgments given in that case are quite consistent with the principle on which I am about to act. The judgment in *Harmer* v. *Harris* (2) is not at variance with the payment out of the testator's estate of all the costs of a Defendant executor, for which he is liable jointly with another who is indebted to the estate. In that case one of the Defendants was an executor, and the others, who had retained the same solicitor, were not. The Master of the Rolls said, "Much of the costs may have been incurred for these Defendants jointly; . . . The costs of the executor are only that proportion of the costs due to the solicitor, with which the latter, as between the co-Defendants for whom he acted, could have charged the executor."

The case before the Court is that of two executors employing a firm of solicitors on a joint retainer; and of a surviving executor who by reason of the joint retainer is liable to pay the whole of the costs which have been incurred to that firm of solicitors in respect of the business done in the suit; and it has been contended that because the co-executor happened to become insolvent and could not pay a balance due from him, therefore the solvent executor is only to be allowed one-half of the costs, and to be left to pay the other half out of his own pocket. That contention appears to me to be against the principle which this Court

(1) 5 D. M. & G. 35. (2) 1 Russ. 155.

V.-C. H.
1874
WATSON
v.
ROW.

has always acted upon, viz., that a trustee must be allowed the whole of the costs which he is liable to pay to his solicitors in the suit, and therefore, in my opinion, the Defendant *Row* must be allowed all the costs which he is liable to pay. But the costs of the Defendant *Woodman*, which have been incurred in respect of his separate liability to the testator's estate, must not be paid to him until he has made good the debt due from him; the Defendant *Row*, however, must have his costs which have been incurred in reference to those inquiries.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle;* Messrs. *E. Flux & Leadbitter.*

V.-C. H.
1874
July 6.

HOOPER *v.* SMART.

[1873 H. 147.]

BAILEY *v.* PIPER.

[1873 B. 20.]

Vendor and Purchaser—Agreement to sell entirety of Fee Simple—Interest in Moiety—Specific Performance with Compensation—Abatement.

3 Ch D. 367
4 Ch D. 46
9 Ch D. 15
19 Ch D 178

Vendors agreed to sell the entirety of certain freehold property for the sum of £6000, and to make out a good marketable title. The purchaser, in consequence of delays on the part of the vendors, filed a bill for specific performance of the agreement. It was subsequently discovered that the vendors were entitled to only a moiety of the property:—

Held, that the purchaser was entitled to a decree for specific performance of the agreement by the vendors of their moiety, with an abatement of one-half of the purchase-money.

Barnes v. *Wood* (1) and *Castle* v. *Wilkinson* (2) observed upon.

MOTION for decree.

By an agreement made in October, 1872, the Defendants *R. F.* and *C. A. Piper*, in the suit of *Bailey* v. *Piper*, agreed to sell to the Plaintiff *Bailey* the fee simple in possession, free from incumbrances, of the entirety of certain freehold property in the bill mentioned for the sum of £6000. The vendors were to make out a good marketable title. The Plaintiff *Bailey* paid £400, and the

(1) Law Rep. 8 Eq. 424. (2) Law Rep. 5 Ch. 534.

See for further proceedings in this suit 5 Ch D 906 C.A.
See also British Mutual Investment Co v Smart L.R. 10 Ch 567

V.-C. H. 1874

HOOPER v. SMART.

BAILEY v. PIPER.

residue of the purchase-money (less a sum of £105 as commission to the parties who negotiated the sale) was to be paid on the completion of the purchase. The Plaintiff *Bailey* entered into possession and laid out the property for building purposes. Questions arose in reference to the title, and in consequence of the great delay on the part of the Defendants *Piper* in completing the sale, the Plaintiff *Bailey* filed a bill against them for specific performance of the agreement. The Defendants *Piper* were subsequently adjudicated bankrupts, and their trustees in bankruptcy were by a supplemental order made Defendants. In January, 1874, a decree in the suit of *Bailey* v. *Piper* was made, declaring that the agreement ought to be specifically performed and carried into execution in case a good title could be made to the property. Certain inquiries were directed in reference to the title, and the Chief Clerk certified that a good title could not be made by the Defendants *Piper* to the entirety; and that the title to an undivided moiety of the property was the subject-matter of a suit, "*Hooper* v. *Smart*," in this Court. It was then ordered that the suit of *Hooper* v. *Smart* should come on to be heard immediately before that of *Bailey* v. *Piper*, and it was held that the Plaintiffs in that case were entitled to an undivided moiety of the property.

It appeared that in the course of the proceedings the Plaintiff *Bailey* had entered into a subsequent agreement with the Plaintiffs in *Hooper* v. *Smart* to purchase their moiety of the property.

Mr. *Dickinson*, Q.C., and Mr. *Horton Smith*, for the Plaintiff *Bailey*, contended that he was entitled to a decree for specific performance with an abatement.

[They referred to *Mortlock* v. *Buller* (1); *Barnes* v. *Wood* (2); *Castle* v *Wilkinson* (3); *Sugden's* Vendors and Purchasers (4); *Dart's* Vendors and Purchasers (5); *Fry* on Specific Performance (6); *Wheatley* v. *Slade* (7); *Maw* v. *Topham* (8).]

Mr. *Macnaghten*, for Mr. *Smart*, the trustee in bankruptcy of *R. F. Piper*.

(1) 10 Ves. 292–315.
(2) Law Rep. 8 Eq. 424.
(3) Ibid. 5 Ch. 534.
(4) 13th Ed. pp. 257–263.
(5) 3rd Ed. pp. 977–978.
(6) Pages 141–142.
(7) 4 Sim. 126.
(8) 19 Beav. 576.

Mr. *Northmore Lawrence*, for Mr. *Nichols*, the trustee in bankruptcy of *C. A. Piper*:—

There is no case in which specific performance with compensation has been decreed on a contract for the sale of the entirety, and where it has been found that there was no title to a moiety. The cases in which specific performance with compensation has been decreed have been either cases where there have been contracts to sell certain undivided shares of property, and there was no title to one or more of such shares, or cases where there have been contracts to sell property, and the vendor had only a limited interest in the property, such as *Barnes* v. *Wood* (1). Specific performance has been refused in two cases like the present, *Wheatley* v. *Slade* (2); *Maw* v. *Topham* (3). The distinction is drawn in *Jones* v. *Evans* (4) by the same Judge who decided *Wheatley* v. *Slade*. Therefore Lord *St. Leonards'* remarks on that case are not concurred in by the Judge who decided it.

SIR CHARLES HALL, V.C.:—

This is a case in which the exercise of the discretionary jurisdiction of the Court is asked for, the bill being one for the specific performance of an agreement. In *Barnes* v. *Wood* the Plaintiff, who in ignorance purchased property in fee, the vendor being entitled to only a life interest, was held entitled to a conveyance of the life interest, with compensation, and a decree for specific performance was made. In that case no injustice was done to the vendor, for he was paid for all that he could sell to the purchaser. So in this case by making the decree asked for no injustice will be done to the trustees in bankruptcy of the Messrs. *Piper*, for they will get the full price of their share of the property sold; perhaps more than they would have got in case the Messrs. *Piper* had sold an undivided moiety, because usually the value of an undivided interest is less in proportion than that of the entirety of an estate. It has been argued that some of the authorities prevent my applying the ordinary rule, viz., that the purchaser may have all he can get from the vendor. The decision in the case of *Barnes* v. *Wood* was fully recognised by Lord

(1) Law Rep. 8 Eq. 424.
(2) 4 Sim. 126.
(3) 19 Beav. 576.
(4) 12 Jur. 664.

V.-C. H. 1874 HOOPER v. SMART. — BAILEY v. PIPER.

Hatherley in giving judgment in the case of *Castle* v. *Wilkinson* (1). The Lord Chancellor there said that the decision, "that where a man proposes to convey the whole of an estate as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the Court can insist on his making good his contract to the extent to which he is able to make it good; and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling," was in strict conformity with the other authorities. In my opinion it would be a denial of justice if I did not make a decree for the specific performance of this agreement to the extent of the undivided moiety to which the Defendants, the Messrs. *Piper*, were entitled when they entered into the agreement; and also order that the vendors do submit to an abatement from the purchase-money of one-half the amount.

Solicitors: Messrs. *Ridsdale, Craddock, & Ridsdale;* Messrs. *Aldridge & Thorn*; Messrs. *Ravenscroft & Hills;* Messrs. *E. F. & B. Davis;* Mr. *F. W. Denny;* Mr. *J. T. N. Burnand.*

V.-C. H. 1874 *April* 24.

In re BEST'S SETTLEMENT TRUSTS.

Marriage Settlement—"Personal Representatives" held to mean "Executors."

By a marriage settlement, the wife's real and personal estate was assigned to trustees on trust to pay the annual income to husband for life, remainder to wife for life, remainder as she should by deed or will appoint; and in default for her personal representatives. The wife pre-deceased her husband, intestate and without issue. After the husband's death, his executors took out administration of the wife's estates:—

Held, that they were entitled to the fund.

BY a settlement, dated the 8th of April, 1826, in contemplation of marriage, between Sir *J. Burrough* and *Charlotte Willis Burrough*, his daughter, of the first part, Sir *W. D. Best* and his son, Rev. *S. Best*, of the second part, and *Best, Knapp*, and *Walker*, trustees, of the third part, after reciting that the said *Charlotte W.*

(1) Law Rep. 5 Ch. 534, 536.

Burrough was entitled to one moiety of the sum of £830 Consols, £600 3 per Cents., £200 3 per Cents., and was also entitled to the sum of £500 Consols, and was seised, to her and her heirs, subject to her father's life interest therein, of one moiety of certain hereditaments in the county of *York;* and was also entitled to one moiety of £6802 12*s.* Consols, £5411 5*s.* 3 per Cent. Reduced, £1250 3 per Cent. Reduced, £367 10*s.* New £4 per Cent., and £500 on mortgage; and reciting that it had been agreed that the said sums should be settled in manner therein mentioned, and that in consideration thereof Sir *William Draper Best* should covenant to settle £5000 in manner therein mentioned; it was witnessed that in pursuance and part performance of the said agreement, she the said *Charlotte Willis Burrough* conveyed the said undivided moiety in the said hereditaments to *Best, Knapp,* and *Walker* (the trustees), their heirs and assigns, to the use of the said *C. W. Burrough,* her heirs and assigns, until the marriage should be solemnized, and from and after the solemnization thereof to the use of *Samuel Best* and his assigns during his life, without impeachment of waste; and from and immediately after his decease, to the use of *C. W. Burrough* and her assigns during her life, without impeachment of waste; and from and after the decease of the survivor of them, the said *Samuel Best* and the said *C. W. Burrough,* to the use of all and every the children of the said marriage, in such shares as the husband and wife should by deed jointly appoint; and in default of such joint appointment, or so far as it should not extend, then to the children of the said marriage, as the survivor should by deed or will appoint, with or without power of revocation; and in default for the children equally, and if there should be but one such child then to that child, and in default of such issue, then to the use of the said *C. W. Burrough,* her heirs and assigns, absolutely for ever. Then followed a power of leasing. The indenture then further witnessed that in consideration of the said marriage the said *C. W. Burrough* assigned to the said trustees the said £500 Consols, and one moiety of the said several sums of money in the said deed mentioned, upon trust for the said *C. W. Burrough,* her executors, administrators, and assigns, until the marriage, and after the marriage upon trust to pay the income thereof to the husband

V.-C. H. 1874 *In re* Best's Settlement Trusts.

for life, remainder to wife for life; and after the decease of the survivor on trust that they the said trustees or the survivor of them, or the executors, administrators or assigns of such survivor, should pay, transfer, assign and dispose of the said moiety of the said several sums of £830 Bank 3 per Cent. Consols, £600 3 per Cent. Reduced Annuities, £200 3 per Cent. of 1726, and the said £500 3 per Cent. Consols, part of the aforesaid trust funds, to such person or persons, and in such manner or form as the said *Charlotte W. Burrough* should by any deed or deeds, instrument or instruments, or by her last will or testament, in writing, duly executed, notwithstanding her coverture, direct, limit or appoint, give or bequeath the same; and in default to such person or persons as should be her personal representative or representatives. The settlement then provided for the distribution of the residue of the trust funds among the children of the marriage as the parents should jointly, or the survivor of them, appoint; and in default of such appointment among the children equally, provided that if there should be but one such child of the intended marriage, it should be lawful for the survivor of the husband or wife, in the event of their marrying again, to settle one moiety of the fund upon a second wife or husband and the issue of the second marriage, by any deed or instrument to be duly executed for the purpose; and that thereupon the said trustees should transfer and set over such one moiety of the trust funds to such person or persons as the survivor of them the said *Samuel Best* and *Charlotte W. Burrough* should on such their second marriage direct or appoint to be trustees for that purpose. Provided also, that if there should be no child of the said intended marriage who should live to acquire a vested interest in the said trust funds, then, subject to the life interest of the said *Samuel Best*, the fund should be held upon trust, to and for such person or persons as the said *Charlotte Willis Burrough* should by will appoint, and in default of such appointment then upon trust to pay or transfer the said fund to "such person or persons as would be the personal representatives of the said *Charlotte Willis Burrough*."

The ultimate limitation of the £5000 settled by the husband's father was to the husband, "his executors and administrators."

The marriage was duly solemnized shortly after the date of

the settlement. There was issue of the marriage only one child, which died in infancy in the lifetime of its parents. *Charlotte Willis Best* (the wife) died intestate in 1833, leaving her husband her surviving, never having exercised any of the powers given by the settlement. At her death her next of kin were her father and one sister of the whole blood and another of the half blood. Her father died in 1837. In 1835 *Samuel Best*, the husband, married again, and died on the 20th of January, 1873, leaving a widow and several children, having by his will appointed Sir *J. E. Phillips*, Bart., and *H. Thompson* executors.

The executors of the husband took out letters of administration to the said *Charlotte Willis Burrough* and claimed the fund. The next of kin of the wife, at the death of the husband, also claimed the fund.

The trustees paid the money into Court under the *Trustee Relief Act*. The executors of the husband now presented a petition praying for a transfer of the fund to them as the legal personal representatives of Mrs. *Best*.

Mr. *Lindley*, Q.C., and Mr. *B. B. Rogers*, for the executors of *Samuel Best*:—

This is a marriage settlement and not a will, and the words must be taken in their ordinary meaning. The natural meaning of "personal representatives" is "executors and administrators," and it is for those who contend for a different construction to make out their case.

But the general design of this settlement requires that the words "personal representatives" should mean "executors and administrators," because the purpose was in certain events that the property should revert to the wife absolutely, which was the natural course. Authorities are of little value in a case of this kind, as each case must depend on its own circumstances.

In *In re Turner* (1), which, however, was under a will, "legal personal representatives" of one of testator's sons was held to mean his executors and administrators. The same thing was decided in *In re Crawford's Trusts* (2), *In re Wyndham's Trusts* (3),

(1) 2 Dr. & Sm. 501. (2) 2 Drew. 230.
(3) Law Rep. 1 Eq. 290.

V.-C. H. 1874 *In re* Best's Settlement Trusts.

Alger v. *Parrott* (1), *Saberton* v. *Skeels* (2). These cases shew that the natural meaning of the words "personal representatives" is "executors and administrators"; and that they will be so construed if there is nothing to shew that a different meaning is intended by the instrument.

The cases of *Briggs* v. *Upton* (3) and *Robinson* v. *Evans* (4), which were decisions upon settlements, are no exceptions to the rule, because in both the judgment proceeded on the ground that next of kin were intended by the particular words there used.

[They referred to *Hawkins* on Wills (5) and *Roper* on Husband and Wife (6).]

Mr. *Dickinson*, Q.C., and Mr. *C. Browne*, for the next of kin of Mrs. *Best* at the date of her death:—

In a marriage settlement "personal representatives" is always construed to mean next of kin, because the principal object of every marriage settlement is to exclude the marital right of the husband, and to allow him to take nothing except what he takes as purchaser. Whenever, therefore, doubtful language occurs in a marriage settlement, it must be interpreted against the husband's marital right, that being the intention of the parties. This case is governed by *Briggs* v. *Upton* (which is as nearly this case as can well be), where Lord *Hatherley* relied on the provision made for the husband. In the case of *Bailey* v. *Wright* (7), Sir *William Grant* expressly decided that under a limitation in a marriage settlement to the personal representative of the wife, the husband was not entitled.

Mr. *Method* appeared for the next of kin of Mrs. *Best* at her husband's death.

Mr. *Vaughan Hawkins*, for the trustees of the settlement.

Sir Charles Hall, V.C.:—

Although this is a question arising upon the construction of a marriage settlement, and the cases which have been referred to

(1) Law Rep. 3 Eq. 328.
(2) 1 Russ. & My. 587.
(3) Law Rep. 7 Ch. 376.
(4) 22 W. R. 199.
(5) Page 107.
(6) Vol. i. cap. 8, sect. 3, 327, *et seq.*
(7) 18 Ves. 49.

are cases—with two exceptions, *Bailey* v. *Wright* (1), and the case before Lord *Hatherley*, *Briggs* v. *Upton* (2)—which have arisen on the construction of wills, I take it to be clear that I must construe the words, "such persons or person as shall be her personal representative or representatives," according to their ordinary meaning, and that ordinary meaning is "executors and administrators;" that the words being in a marriage settlement as distinguished from a will are not to be taken as having other than their ordinary meaning, unless there is something in the nature of the settlement or the context to give them a different meaning. The question then is, whether, upon the construction of this particular instrument, the words have any other than their ordinary meaning. The settlement was a settlement made upon the marriage of a lady who had a considerable fortune. I think the personal property alone was something like £15,000 or £16,000, and she had also real estate. The mode of settling the property which was to be settled, so far as it is referred to in the recitals, does not assist us in construing the instrument itself. The trusts which are declared of the different properties are, as to the real estate, trusts for husband and wife and children, with an ultimate trust for the use of the wife. The ultimate trust, therefore, of that property was an ultimate trust re-vesting in her the dominion and control over that property, subject to the particular trust created for the husband and wife and children. That, according to one case upon this subject which has been referred to, might indicate generally the character of the ultimate trusts, namely, that under the settlement that was to be made of all the lady's property, she was to get back, subject to the particular provisions, all the property, and remain the owner thereof. That is not an unreasonable view to take of a settlement made upon marriage, the object of the settlement being to provide a life interest for the wife, probably a life interest for the husband, and proper provision for the issue of the marriage, subject to which it is not an unreasonable view that the parties did not mean to go further. Collateral relations were, at all events, not in contemplation, there not being a settlement upon other persons than the husband and wife and children. Where the property is the property of the wife,

(1) 18 Ves. 49. (2) Law Rep. 7 Ch. 376.

V.-C. H. 1874 *In re* BEST'S SETTLEMENT TRUSTS.

subject to trusts for the husband and wife and children, provisions are commonly introduced which give the wife powers of disposition over the property in the event of her dying in the lifetime of her husband, the power being ordinarily a testamentary power, and not a power by deed or will. That is the ordinary mode of giving to the wife power of disposal if she dies in the lifetime of her husband. If she survives the husband, the ordinary course is to give the property back to her. So giving it back to her if she survives her husband, she is enabled to make a settlement of the property upon the occasion of another marriage, supposing there is a failure of the trusts for the children of the contemplated marriage. The settlement in the present case contemplated and provided for the case of a second marriage, either of the husband or the wife, and it provided that which I do not know I ever saw in a settlement before, that the husband, in the case of there being one child, and one child only, of the marriage, or the wife, in like manner, should have power to appoint and settle upon a second marriage half the capital of the wife's property. This was a very liberal provision for the husband, but the settlement made no provision as to settling on a future marriage, in the case of there being no child of the contemplated marriage. Anything more improbable than that the wife, in making a settlement of her own property, should have put this considerable personal estate entirely out of her control in the event, which might have happened, of her husband dying very shortly after the marriage, without there being a child of the marriage, and have tied that property up in favour of persons who might answer the description of her next of kin at the time of her death, without the power of making any provision whatever on the occasion of a second marriage—anything more improbable than that cannot be conceived. I think that it is not unreasonable, in construing the settlement, to give weight and consideration to that circumstance, and to what I have said as to the general object and purpose of settlements made upon marriage. We know that such considerations have had weight in other cases in reference to the construing of marriage settlements, particularly in reference to the time of vesting of portions. The Court has construed settlements in reference to the known and general views of persons making settle-

ments, as to the time of vesting of the portions. In this case the property was settled upon the husband and wife successively. Then, as regards a portion of the fund, the wife has a general power of appointment over it, and that is by deed or will. Nothing seems to turn on that. It is merely this: that having a considerable fortune in effect subject to these two life interests, she had a general power of disposition over that portion, even as against any issue of the marriage. The bulk of her property was settled in the ordinary way upon the children of the marriage, and, failing children, the ultimate trust in default of testamentary appointment by the wife (which is the trust to be construed) was to transfer the funds to such person or persons as would be the "personal representatives of the said *Charlotte Willis Burrough*." The ultimate trust of the small fund which I have mentioned before, over which she had a general power of appointment as against the children of the marriage, was in similar terms, with the exception that the words there were "personal representative or representatives." But there is no difference in reality in the construction of the words when we bear in mind that the words are "to such person or persons" in both cases; the construction, therefore, of the two clauses must be the same. It is said that the context in this case shews that these words ought to be construed, not according to their *primâ facie* or ordinary meaning, but ought to be construed in such a way as to exclude the husband from taking, and that you can only do that by construing them as words of purchase, or as meaning the persons who shall answer the description of the next of kin of the settlor. I have already observed upon the limitation of the real estate and the form in which that is expressed. It is said, as regards the husband's property, the ultimate limitation is to him his executors and administrators. It is said further, that the trusts of the lady's fortunes, until the marriage, are for her, her heirs and assigns, and for her, her executors, administrators, and assigns; and it is said that there is a distinction between the words used in those two trusts and in the ultimate trust, and therefore that something different was meant. That is a very fair observation, but, after all, not a very cogent one; because, if the latter words do, according to their settled *primâ facie* meaning, mean substantially the same thing, there is no reason why persons

V.-C. H. 1874 *In re* BEST'S SETTLEMENT TRUSTS.

should not use a different form of expression in one part of an instrument from that which they have used in another, knowing that, *primâ facie*, the meaning of the words is substantially the same. We must have regard to the whole of the context of the instrument. Looking at the form of this settlement—looking at the special power which it contains to make a settlement on a second marriage, to take away a portion of the funds from the persons who are made objects of this settlement and settle it on a second marriage—and considering that it could not have been intended that the wife should be in a worse position because she did not happen to have one child of the first marriage; that she must have been meant to be able to make a settlement upon a second marriage although there was no child of the first marriage—it appears to me we cannot properly depart from the *primâ facie* meaning of the words, "the personal representatives of *Charlotte Willis Burrough*." Construing those words in the way I think they ought to be construed, as meaning executors and administrators, the object of entitling the wife, if she happens to be the survivor, to the property, thus bringing it back to her, and enabling her to demand possession of it, and to make a settlement on a second marriage, is accomplished; and it must be borne in mind that the settlement enabled the wife, if she thought proper, to exclude the marital right, as regards both portions of the fund, by the exercise of the two powers which were vested in her, the one a general power of appointment over a small portion of the fund, and the other a testamentary power of appointment which would enable her to exclude her husband by means of the exercise of that power.

I do not think it necessary to examine all the authorities which have been referred to; I may, however, refer to one or two of them. The case of *Robinson* v. *Evans* (1), the most recent case, was before the Master of the Rolls, and there the Master of the Rolls proceeded very much upon the special circumstances of the case, which induced him to consider that in that particular case the words were not to receive their ordinary construction. He found circumstances there which he thought warranted that conclusion. Therefore that case depends upon its

(1) 22 W. R. 199.

own circumstances; and, indeed, the Master of the Rolls seemed to consider that all these cases depend upon their own circumstances, rather than upon any particular authorities; but he observed, no doubt, that the framer of the settlement knew how to use the words, if he desired to do so. He did not, however, attach any great weight to that, because he went into all the circumstances of that particular case.

Then with regard to the case of *Bailey* v. *Wright* (1). There, of course, the particular case is no authority for this, because the words are totally different. In that case the ultimate trust was for the next of kin or personal representative. The decision turned very much upon that which was the context, namely, what was the meaning of the words "next of kin" associated with the words "personal representatives;" and Sir *William Grant*, in giving judgment in that case, winds up with this: "Whatever those words might mean standing by themselves, they cannot, as here used, take from the first words the sense they properly bear, and were in this case obviously intended to bear." Then *Briggs* v. *Upton* (2) was referred to. There the words were different. The Lord Chancellor made some observations, to which my attention has been called, which rather indicate that the object of the settlement might be taken to be to exclude the marital right. But, for the reasons I have mentioned, I do not think those observations can be applied to the case now before the Court. Therefore, upon the whole, it seems to me that this fund must be transferred to the executors of the husband as administrators to the wife.

An appeal in this case was compromised after it had been opened.

Solicitor for the Petitioners: Mr. *P. J. Bishop.*
Solicitors for the Respondents: Messrs. *Beachcroft & Thompson.*

(1) 18 Ves. 49. (2) Law Rep. 7 Ch. 376.

V.-C. H.
1874
May 23.

In re HOPKINS' TRUSTS.

Life and Fire Insurance—Shares—Dividends—Capital and Income—Tenant for Life and Remainderman.

A holder of shares in both departments of the *Sun Fire and Life Office* bequeathed his personal estate to trustees on trust to permit his wife to receive the dividends, interest, and income thereof for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on the life shares for five years previously; and in July, 1873, a "special dividend was declared on the fire shares for the half year previous:—

Held, that these dividends were income, and belonged to the tenant for life.

H. G. HOPKINS, the testator, by his will, after having given several pecuniary legacies, gave the residue of his personal estate to trustees upon trust at their discretion either to continue the said personal estate and effects, or any part thereof, upon the investments in which the same might be at the time of his decease, or to call in and convert the same, or any part thereof, into money, and lay out and invest the same in manner therein mentioned, and then "to permit and empower his wife to receive the dividends, interest, and income of the trust moneys, stocks, funds, shares, and securities" during her life, and on her death, after payment thereout of certain legacies, to permit his brother to receive the residue of the same dividends, interest, and income for his life, and after his decease upon trust to pay and divide the capital of the said personal estate among the children of his said brother, as in the said will mentioned. He died in December, 1870. Part of the testator's property which the executors allowed to remain unconverted consisted at his death of twenty-five shares in the *Sun Life Office* and fifty-two in the *Sun Fire Office*, on which dividends or payments had accrued due after the testator's death, of which the trustees had paid to the widow as tenant for life all those which had accrued due previously to January, 1873. In that month they received in respect of the twenty-five shares in the *Life Office* a sum of £278 15s., which was, by a resolution of the office, called an "extraordinary divi-

dend" for the five years ending on the 24th of June, 1872. In July, 1873, they received in respect of the fifty-two shares in the *Fire Office* a sum of £520, which by a resolution was declared the "special dividend for the year ending the 24th of June, 1873." Doubts having arisen whether these sums were income or capital of the testator's estate, the trustees paid the sums, amounting to £798 15*s.*, into Court, under the *Trustee Relief Act.*

By the deed of settlement of the company, which bore date the 15th of June, 1810, the capital was fixed at £480,000, divided into shares of £100 each, of which 10 per cent. had been paid up. It was also stipulated that the sum of £48,000 should be set apart as a "separate fund," and that the residue and all accumulations should form a fund called "the surplus fund." It was also provided that after the expiration of four years from the date of the deed dividends not exceeding £5 per cent. on the amount of the separate fund might be declared annually and paid out of that fund, but so as never to reduce the capital of the fund below £48,000; that after the expiration of twelve years from the foundation of the society dividends might be declared at intervals of not less than seven years on the surplus fund, to an amount not to exceed one-half the amount of the fund, and that the other half should be added to the separate fund until it amounted to £100,000, when a larger proportion of the surplus fund might be divided among the shareholders. It was also provided that if at any time it might appear expedient to the managers at a general meeting of shareholders a large amount of the profits might be added to the capital.

In the *Life Office* branch the separate fund now amounted to £262,360. The managing body had varied the periods for declaring, and also the amount of dividends. Latterly a dividend of £5 per cent. was paid half-yearly on the amount of the separate fund, and a dividend every five years on the surplus fund. In January, 1873, an extraordinary dividend was declared (which as to Mr. *Hopkins'* shares amounted to £278 15*s.*), and was described in the actuary's letter as "paid out of profits made during the quinquennial interval."

In the *Fire Office* branch an ordinary dividend was paid every half year upon the shares. There was also a special dividend

V.-C. H. 1874 *In re* HOPKINS' TRUSTS.

paid, at irregular intervals and of varying amounts, out of surplus profits. The amount of this special dividend was regulated by the proportion between profit and loss for some time antecedent to the declaration of the dividend. In 1871–2 special dividends had been declared and paid. The letter of the secretary described the dividend of £520 declared in July, 1873, which was paid with the ordinary dividend, as a "special extra dividend paid in the terms of the resolution out of the profits of the business."

The testator's widow presented this Petition, praying for the payment of the dividends to her.

Mr. *Morgan*, Q.C., and Mr. *G. S. Law*, for the Petitioner:—

The testator, who was well acquainted with these shares, which he had held for many years, when he gave to his wife the dividends, interests, and income, must have intended her to have those dividends, whatever they might be.

But dividends in a public company, earned before, but declared after testator's death, are income, not capital: *Browne* v. *Collins* (1); *Bates* v. *Mackinley* (2). It is quite clear there can be no apportionment: *Jones* v. *Ogle* (3). In *Maclaren* v. *Stainton* (4) a bonus on shares declared after testator's death was held to be part of his residue, but that was a very special case.

It makes no difference that the dividends declared differed from the usual amount, and were described as and were extraordinary: *Price* v. *Anderson* (5). In *Preston* v. *Melville* (6) a bonus on bank stock was held to belong to a tenant for life. It is admitted that the company might have capitalized this profit, but not having done so, it remained income: *Straker* v. *Wilson* (7); *Ibbotson* v. *Elam* (8). It is submitted, therefore, that these dividends are income, and belong to the Petitioner.

Mr. *Bristowe*, Q.C., and Mr. *H. Dalton*, for the remaindermen:—

These extraordinary dividends or bonuses are in their nature capital and not income: *Paris* v. *Paris* (9). It is true that the

(1) Law Rep. 12 Eq. 586.
(2) 31 Beav. 280. 6 Jur N.S. 299
(3) Law Rep. 8 Ch. 192.
(4) 27 Beav. 460. 6 Jur N.S. 360
(5) 15 Sim. 473.
(6) 16 Ibid. 163.
(7) Law Rep. 6 Ch. 503.
(8) Ibid. 1 Eq. 188. 33 Beav. 594.
(9) 10 Ves. 185. 12 Jur N.S. 114

declaration rather treated these dividends as income, but there could be no apportionment among successive tenants for life, and if so, the dividends must be deemed to be capital. Here, in fact, the profits were capitalized before division. *Plumbe* v. *Neild* (1), when examined attentively, really governs this case. Suppose new shares had been granted in respect of the old shares, it was manifest that they would have been capital.

Mr. *Morshead* appeared for the trustees, but took no part in the argument.

SIR CHARLES HALL, V.C.:—

The arguments have proceeded in this case on the assumption that the resolutions for the payment of the money were for the payment of it as bonus or dividend; and it is on this assumption that I deliver my judgment. I am of opinion that in the present state of the authorities on this subject the tenant for life is entitled to these dividends, unless, as has been contended, they were paid by the office out of capital. If, indeed, that were so, whether they were called bonus or dividend, they would be payments out of capital, and therefore capital, and would belong to the remaindermen and not to the tenant for life.

The constitution of the *Sun Office* appears to be this: they commenced business with the appropriation of a specific sum of £48,000 out of their capital as a fund which was never to be encroached upon, but, on the contrary, was to be augmented at future times. For four years they paid no dividend, but at the expiration of that time they began to pay a dividend out of the £48,000, which, whether it was more or less than that precise sum, was called and considered a separate fund. The dividend so paid did not exceed £5 per cent., but there was a provision for something more, for after paying the dividend out of the £48,000 another fund was set apart, called the surplus fund, which was invested in the ordinary way. It was provided that at the expiration of twelve years from the date of the deed of settlement of the company—a period afterwards altered to seven years and then to five—dividends were to be paid out of that fund. That fund was

(1) 6 Jur. (N.S.) 529.

V.-C. H. 1874 *In re* HOPKINS' TRUSTS.

appropriated, not as being part of the capital of the concern, but as a dividend fund out of which dividends were declared and made payable. This was therefore a case of the ordinary kind, viz., the payment of dividends out of a fund appropriated to that specific purpose.

In *In re Barton's Trust* (1) Lord *Hatherley*, then Vice-Chancellor, said: "If a man has his shares placed in settlement he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children and not to the tenant for life (their mother)." Such was Lord *Hatherley's* view in that case, but there is nothing like that here, because on the face of the resolutions referred to the money is treated as dividend and not capital. No doubt resolutions might have been passed that the money was capital, but even in that case a grave question might have arisen whether such a resolution would not have been at variance with the deed of settlement of the company. Having regard to the constitution of the company, I much doubt whether it would have been competent to them to pass such resolutions. The order must be to pay the Petitioner the two sums, £278 15*s.* and £520, as prayed.

As on the Petition the question has been determined, the costs of all parties must come out of the fund.

Solicitors for the Petitioner: Messrs. *Law, Hussey, & Hulbert.*

Solicitors for the Respondents: Messrs. *E. & H. Tylee, Wickham, & Moberley.*

(1) Law Rep. 5 Eq. 238, 245.

Ex parte WATERS. *In re* WATERS.

C. J. B. 1874 June 29.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 19—*Failure of Debtor to deliver up Property to Trustee after Discharge—Contempt of Court—Committal—Jurisdiction.*

On the 8th of October the creditors of two debtors, who were partners in trade, resolved on a liquidation, and appointed trustees, and on the 5th of November they granted the debtors their discharge in respect of their partnership liabilities. The trustees employed the debtors as their servants, at a weekly salary, to realize the estate. After the order of discharge was granted one of the debtors received moneys on account of the partnership estate, and applied them in paying his separate creditors. An order was made by the County Court that he should refund the moneys thus misapplied, and he failed to obey the order:—

Held, that there was jurisdiction under sect. 19 of the *Bankruptcy Act*, 1869, to commit him for contempt of Court.

THIS was an appeal from a decision of the Judge of the *Norwich* County Court.

Henry Augustus Sheaves and *Robert Waters* were coal merchants at *King's Lynn*. On the 17th of September, 1873, they filed a liquidation petition. The first meeting of the creditors was held on the 8th of October, when a liquidation was resolved upon, and *J. H. Beeby* and *Robert Baldry* were appointed trustees of the estate. It was also resolved that it should be left to the sole discretion of the trustees whether or not they should carry on the business of the debtors, or whether or not the estate should be at once realized. Meetings of the separate creditors of each of the debtors were also held, at which similar resolutions (*mutatis mutandis*) were passed. At the second meeting of the creditors, held on the 5th of November, it was resolved that the discharge of the debtors be granted to them in respect of their partnership liabilities. The trustees proceeded to realize the estate, and for that purpose they employed both the debtors to act as their servants or clerks, at a salary of £1 per week each, their duties being to realize the stock, collect the book debts, and keep the accounts on behalf of the trustees, and under their supervision. On the 16th of December the trustees, upon investigating the accounts, discovered that *Waters* had, after the order of discharge was granted, received on

C. J. B.
1874
Ex parte WATERS.
In re WATERS.

account of the partnership estate sums amounting to £188 3*s.* 10*d.*, out of which he had, on the 13th of December, paid to some of his private creditors sums amounting to £111 3*s.* 2*d.* *Waters*, on being asked for an explanation, said that he was determined his private creditors should be paid in full. He applied the remainder of the £188 3*s.* 10*d.* in paying others of his private creditors. The trustees discharged the debtors from their service, and on the 13th of April, 1874, they obtained an order from the County Court that *Waters* should, on or before the 18th of May, pay to the trustees the sum of £188 3*s.* 10*d.* *Waters* failed to comply with this order, and on the 28th of May the Judge made an order that he should be committed to *Norwich Castle* for contempt of Court. From this order *Waters* appealed.

Mr. *Bagley*, for the Appellant:—

The County Court Judge treated this as a breach of trust. I contend that there was no trust, and therefore no power to imprison under the exceptions contained in sect. 4 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62): *Ex parte Hooson* (1). Nor was there any jurisdiction to make the order under sect. 19 (2) of the *Bankruptcy Act*, 1869. The money was received by the Appellant as the servant of the trustees, and not in his character of debtor. Moreover, it was received after the order of discharge was granted.

Mr. *Finlay Knight*, for the trustees, was not called upon.

SIR JAMES BACON, C.J.:—

This case is one of great importance in itself, and also as affecting the liberty of the subject. I think it is entirely covered by sect. 19 of the Act. Between liquidation and bankruptcy there is for this purpose no distinction. Nor is there any distinction by

(1) Law Rep. 8 Ch. 231.

(2) Sect. 19 provides: "The bankrupt shall, to the utmost of his power, aid in the realization of his property, and the distribution of the proceeds amongst his creditors. . . . If the bankrupt wilfully fail to perform the duties imposed on him by this section, or if he fail to deliver up possession to the trustee of any part of his property, which is divisible amongst his creditors under this Act, and which may for the time being be in the possession or under the control of such bankrupt, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court, and may be punished accordingly."

reason of the fact that the debtors' discharge had been granted before this money was misapplied. The discharge only releases them from the debts provable in the liquidation, and not from the obligation to perform the duties prescribed by the statute during the liquidation. [His Honour read sect. 19 of the Act.] That it was the plain duty of this debtor to assist the trustees to the utmost of his power in the realization and distribution of the estate, no one can doubt. That he was engaged as the servant of the trustees at a salary for that purpose, does not, I think, make any difference. As the debtors were deprived of their means of subsistence, it was not unreasonable that the trustees should pay them a remuneration for their services. But they were services which the trustees would have been entitled to require, and which the debtors would have been bound to render, without any remuneration. The case seems to me to come clearly within the provisions of sect. 19, and I think that the Judge of the County Court would not have properly discharged his duty if he had not made this order. It is true that in the course of his judgment he speaks of the offence as a breach of trust, but that is of no importance. It was in all senses a gross breach of trust thus to misapply these moneys. But, independently of that, this debtor was bound by the provisions of the statute to assist the trustees in the distribution of these moneys among his creditors. I think the order is right, and the appeal must be dismissed.

Solicitor for the Appellant: Mr. *A. Storey*, agent for Mr. *W. H. Daly, Norwich.*

Solicitors for the Trustees: Messrs. *Sharpe, Parkers, & Co.*, agents for Mr. *Joseph Stanley, Norwich.*

C. J. B.

1874

July 27.

Ex parte HIRST. *In re* HIRST.

Liquidation—First General Meeting—Notice of Meeting—Signature—Bankruptcy Rules, 1870, *rr.* 255, 256—*Bankruptcy Forms of* 1870, *Nos.* 108, 110.

It is not necessary that the notice summoning the first general meeting of creditors under a liquidation petition should be signed by the debtor's attorney with his own hand.

The notice is sufficient if the attorney's name is subscribed by his clerk by his direction.

THIS was an appeal from a decision of the Judge of the *Sheffield* County Court.

On the 11th of June, 1874, *George Hirst*, a druggist at *Sheffield*, filed a liquidation petition. On the 8th of July the creditors, at their first meeting, resolved upon a liquidation.

The Registrar refused to register the resolutions, on the ground that the notice summoning the meeting was not duly signed. It purported to be signed by *William Fretson*, who was the debtor's attorney; but it was not in fact signed by him with his own hand. His name was signed by his clerk in conformity with his express instructions. The Registrar held that this was insufficient, and refused to register the resolutions. His decision was confirmed by the Judge.

The debtor appealed.

Mr. *Finlay Knight*, for the Appellant, referred to the *Bankruptcy Rules*, 1870, rr. 255, 256, and to the *Bankruptcy Forms*, 1870, Nos. 108, 110.

Mr. *Bagley*, for an opposing creditor.

SIR JAMES BACON, C.J., said that the signature was sufficient, and that the registration of the resolutions ought not to have been refused.

Solicitors for the Debtor: Messrs. *Pitman & Lane*, agents for Mr. *W. Fretson, Sheffield.*

Solicitor for the Creditor: Mr. *Butcher*, agent for Mr. *W. E. Tattershall, Sheffield.*

Ex parte ASHWORTH. *In re* HOARE.

C. J. B.
1874
July 20.

Adjudication of Bankruptcy—Power to annul—Liquidation Petition filed after Bankruptcy Petition—Adjudication made before Liquidation resolved on—Secured Creditor—Voting—Non-production of Security—Bills of Exchange—Registration of Resolutions—Resolutions in part ultrà vires—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16, 28, 40, 80, *sub-s.* 10, 84, 125—*Bankruptcy Rules*, 1870, *rr.* 260, 266, 271, 272, 275, 295.

The Court has a general jurisdiction to annul an adjudication of bankruptcy in a proper case.

A debtor filed a liquidation petition, and his creditors resolved on a liquidation by arrangement, but before they did so an adjudication of bankruptcy had been made against the debtor on a petition presented before the filing of the liquidation petition :—

Held, that the Court could annul the adjudication, either under Rule 266 or under its general jurisdiction.

It is sufficient for the validity of the vote of a creditor who holds bills of exchange or promissory notes signed by the debtor if he produces the bills or notes before the registration of the resolutions upon which he has voted.

If a secured creditor votes without producing his security his vote is valid, but his security is forfeited.

Where some of the resolutions passed by creditors are *ultrà vires*, the Court has power to direct the registration of the rest.

THIS was an appeal from a decision of the Deputy Judge of the *Southampton* County Court.

On the 11th of March, 1874, a bankruptcy petition was filed against Mr. *P. M. Hoare* in the *Southampton* County Court by Mr. *Edmund Ashworth*, the act of bankruptcy alleged being the failure to comply with the requirements of a debtor's summons. Orders were immediately made restraining further proceedings under an execution which had been levied on the debtor's goods, and appointing a receiver of the debtor's property.

The 2nd of April was fixed for the hearing of the petition.

On the 31st of March *Hoare* filed a liquidation petition in the *London* Bankruptcy Court. The first meeting of the creditors was summoned for the 30th of April.

On the 2nd of April an order of the County Court was made by consent, adjourning the hearing of the bankruptcy petition till the 14th of April; and on the 14th of April another order was made

C. J. B. 1874 *Ex parte* Ashworth. *In re* Hoare.

(also by consent) further adjourning the hearing to the 24th of April. On the 24th of April the petitioning creditor refused to consent to any further adjournment, and an order was made adjudicating *Hoare* a bankrupt. It was agreed that the advertisement of the adjudication should be stayed till after the 30th of April.

On the 30th of April the first meeting of the creditors under the liquidation petition was held, and the following resolutions were passed by a majority which purported to be the proper statutory majority :—

"1. That four creditors named should be appointed a committee to inquire into and investigate the affairs of the debtor, and to report to the adjourned meeting.

"2. That the proceedings be transferred to the *Hampshire* County Court from the *London* Bankruptcy Court.

"3. That the meeting be adjourned to the 22nd of May.

"4. That application be made to the Court at *Southampton* for a stay of the proceedings under the bankruptcy for one month."

The proofs tendered at this meeting by three of the largest creditors were objected to, and if these proofs had not been admitted the result would have been that the resolutions would have been rejected by a small majority in value of the creditors present or represented at the meeting.

The proofs objected to were these :

That of *William Day* for £13,443 7*s.* 8*d.* was objected to on the ground that certain securities, which in his affidavit he stated that he held, were not produced. The securities were a deed of covenant executed by the debtor, two bills of exchange accepted by the debtor, and a bond signed by him.

The proof of Mr. *P. R. Hoare,* the debtor's father, for £52,400, was objected to on the ground that whereas the affidavit stated that the father had no security for his debt, he in fact held bonds for it, which were not produced.

The proof of Messrs. *Hoare,* bankers, for £7500 was objected to on a similar ground.

In each case a note of the objection was made by the chairman of the meeting on the back of the proof.

On the 1st of May an order of the County Court was made

further staying the advertisement of the adjudication and all proceedings thereunder until after the 29th of May, and the 16th of June was appointed for the first meeting of the creditors under the bankruptcy.

On the 22nd of May the adjourned meeting of the creditors under the liquidation petition was held, and the following resolutions were passed by a majority purporting to be the proper statutory majority:—

"1. That the affairs of the debtor be liquidated by arrangement, and not in bankruptcy.

"2. That *C. L. Nichols* and *W. H. Davis* be appointed trustees.

"3. That the adjudication of bankruptcy made against the debtor by the County Court be forthwith annulled."

A second set of resolutions was also passed, which were as follows:—

"1. That the trustees be authorized to sell and assign the whole of the property of the debtor to his father, Mr. *P. R. Hoare*, upon payment of the sum of £10,000, which the said *P. R. Hoare*, in consideration of the discharge of the debtor being granted, offered to pay to the trustees for the benefit of the creditors other than the said *P. R. Hoare* and his firm of *Hoare & Co.*, bankers, whose claims are to be released.

"2. That upon the payment of such sum of £10,000 and execution of a release of their claims by the said *P. R. Hoare* and *Hoare & Co.*, the trustees shall certify to the Court that the debtor is entitled to his discharge."

At this meeting Mr. *P. R. Hoare* tendered an amended proof, and withdrew his former proof. His new affidavit stated that the debtor owed him £50,700 for principal money lent, for which he held nine bonds and a promissory note of the debtor, mentioned in the schedule, and the further sum of £8043 19*s.* 5*d.* for interest on the bonds and note, and further, that he had no security for the same, except the bonds and note, save and except a lien which he claimed upon an annuity of £500 payable by him during the joint lives of himself and the debtor to the trustees of a settlement made on the debtor's marriage and for his benefit. The affidavit estimated the value of the lien at £3000, and claimed to

C. J. B. 1874 *Ex parte* Ashworth. *In re* Hoare.

prove in the liquidation for the balance of the debt. The bonds, bills, notes, and other securities held by the creditors whose proofs had been objected to were produced at this meeting.

On the 27th of May an application for the further staying of the advertisement of the adjudication was refused; and on the 2nd of June the adjudication was advertised.

The resolutions passed at the adjourned meeting under the liquidation petition were taken into the County Court for registration. The registration was opposed by Mr. *Ashworth*, who attended before the Registrar under protest. On the 2nd of June the Registrar decided to register the first set of resolutions, but he held that the second set was *ultrà vires*, and refused to register them. Mr. *Ashworth* appealed to the Deputy Judge of the County Court; and he, on the 18th of June, affirmed the decision of the Registrar as to the registration, and also made an order annulling the adjudication of bankruptcy. From both these orders *Ashworth* appealed.

Mr. *De Gex*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

After an adjudication of bankruptcy had been made on a creditor's petition, the creditors had no power to resolve on a liquidation; sect. 125 does not apply to such a state of circumstances. Upon the adjudication all the bankrupt's property vested in the trustee under the bankruptcy: *Ex parte Treherne* (1). According to *Ex parte Jay* (2), the petitioning creditor could, after the appointment of a receiver, make no bargain with his debtor. Under the *Bankruptcy Act*, 1869, there is no jurisdiction to annul an adjudication except under sect. 28 or sect. 84, neither of which apply to the present case; nor does sect. 80, sub-sect. 10, apply.

Moreover, the resolutions passed at the first meeting under the liquidation petition were invalid, and this makes the resolutions of the adjourned meeting also invalid: *Ex parte Orde* (3). The creditors who did not produce the bonds and promissory notes of the debtor which they held, ought not to have been permitted to prove or vote: *Ex parte Jacobs* (4).

(1) 2 D. F. & J. 656. (3) Law Rep. 6 Ch. 881.
(2) Law Rep. 9 Ch. 133. (4) Ibid. 17 Eq. 575.

Again, the Registrar had no power to register part only of the resolutions; if any of them were *ultrà vires*, as was clearly the case here, he ought to have rejected the whole: *Bankruptcy Act*, 1869, s. 125, sub-s. 4; *Bankruptcy Rules*, 1870, rr. 275, 295.

Mr. *Little*, Q.C., and Mr. *Bagley*, for the debtor, were called upon only as to the validity of the resolutions:—

With the exception of the charge upon the annuity, all the other so-called securities were nothing more than personal obligations on the part of the debtor; they created no charge upon his estate. A person holding such obligations is not a secured creditor within the definition given by sect. 16, sub-sect. 5. All objections to the resolutions are, according to sect. 125, sub-sect. 4, and rule 295, to be dealt with by the Registrar upon the application to register. Therefore production of the securities at the adjourned meeting, or before the Registrar, was quite sufficient. At any rate, a secured creditor by voting in respect of his whole debt only forfeits his security; his vote is not invalidated.

Mr. *Benjamin*, Q.C., and Mr. *Northmore Lawrence*, for the trustees under the liquidation, and for creditors:—

Ex parte Browning (1) shews that the Registrar was right in registering those resolutions only which were *intrà vires*.

Rule 266 (2) gives the Court power to annul the adjudication. Non-production of securities at the meeting can be cured by production before registration of the resolutions. Section 82 of the Act provides that no proceeding shall be invalidated by a formal defect, or by any irregularity, where no substantial injustice has been caused.

(1) Law Rep. 9 Ch. 583.

(2) Rule 266: "Where proceedings have been instituted for liquidation or composition, the Court may adjudicate the debtor bankrupt if, in the opinion of the Court, the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or extraordinary resolution in reference to the liquidation or composition, and, in the event of any such resolution being duly passed, the adjudication shall be forthwith annulled."

C. J. B. 1874 *Ex parte* Ashworth. *In re* Hoare.

Mr. *De Gex*, in reply:—

Bonds or promissory notes must always be produced before proof can be admitted, though their value has not to be deducted in estimating the amount in respect of which the creditor is entitled to vote. The duty of the Registrar is to see whether objections which were taken at the meeting were good at the time when they were taken. Rule 266 has no application.

Ex parte Dimond (1) shews that a creditor ought not to be deprived of his legal right to an adjudication by reason of the debtor filing a liquidation petition.

Sir James Bacon, C.J.:—

There are two appeals in this case. The appeal against the order of the learned Deputy Judge affirming the act done by the Registrar in registering the resolutions is, in my opinion, the first thing to be considered, as the case depends mainly, if not entirely, upon those resolutions.

Now, at the meeting on the 30th of April there were present creditors representing *primâ facie* a very large majority in favour of the proceedings for liquidation. An objection was taken to the proof made by the debtor's father for a very large sum, and a note of the objection was made by the chairman of the meeting. That note was written upon the proceedings, and the effect of that was, that thereafter when the Registrar came to discharge his duty —that of registering or not registering the resolutions—the objection would be dealt with by him. That I take to be clearly the law contained in the statute and the rules as to resolutions. Another meeting was held, at which the father, finding there had been an objection to his proof, amended his deposition by stating that he had securities, as they are called, for his debt, and he mentioned certain bonds and a promissory note of the debtor. That appears upon the proceedings of the second meeting, and is one of the things which is tendered to the Registrar on the application for registration. The father says, moreover, that he also claims a lien upon a certain annuity payable to the trustees of a marriage settlement for the benefit of the debtor, and that annuity may in some sense be said to be a part of the debtor's estate.

(1) Law Rep. 5 Ch. 743.

C. J. B.
1874
Ex parte ASHWORTH.
In re HOARE.

Now what is the meaning of the provisions that creditors holding security shall not prove without either producing their securities and having them valued, or giving them up, or forfeiting them? It means that the estate which is to be administered among the creditors shall not be diminished by some one creditor, who holds security, taking part of that estate and coming to take his dividend out of what then remains. The security in this case consists of bonds of the debtor, and they are no security at all in the proper sense of the word. They are mere engagements by the debtor to pay his debts, and they are in no other sense security. As to the lien which the father says he has upon the annuity, it is not unreasonable to suppose that he has been advised since he made his first proof that he might make some such claim; but inasmuch as he has exercised his right of voting upon the first occasion, that security, if it be a valuable security, has been parted with for the benefit of the debtor's estate. The estate will get the benefit of it, but the right of the creditor to prove is in no respect impaired. He proves for the whole debt due to him, as he has a right to do, but he gives up that security which ought to have been stated in the first instance, if there is any value in it. In my opinion, the not setting out the bonds was no objection whatever to the proof.

Then, with respect to Mr. *Day's* proof, it is quite clear that he had no security. He had a bill of exchange and a deed containing covenants by which the debtor is supposed to be bound. That is no security. The case of the bank is the same thing. They held bills of exchange and they did not produce them.

It is quite clear that for the purpose of the first meeting, unless there was some misrepresentation by these creditors, which would be detected when the matter went before the Registrar, there is no objection to any of these proofs. If there was any objection capable of being raised before the Registrar, I must assume that it was raised in this case, though perhaps not very fully or very formally. The present Appellant, by his solicitor, attended before the Registrar and objected to the registration; and it was not only competent to the Registrar, but it was his duty, to deal with any objection which had been taken to the proofs upon the evidence before him. I think he came to a right conclusion, and that no objection could be sustained against the right of these creditors, whose debts were unobjectionable, to vote as they did at the first

C. J. B. 1874 *Ex parte* Ashworth. *In re* Hoare.

meeting and at the second. The whole scope and meaning of the Act of Parliament, and of the Rules which form a part of the Act and are to be read with it, is evidently that the creditors shall have it in their power to decide how the affairs of their debtor shall be dealt with. Here I find that the creditors have resolved, by an overwhelming majority, that there shall be liquidation and not bankruptcy. I cannot consider that they came to that resolution otherwise than with regard to their own pecuniary interest. I could not assume that under any circumstances, and especially not when I find, what I cannot fail to notice, that the real substance of the transaction was this, that, this debtor possessing no assets in comparison with the large amount of his debts, the creditors were told on the part of the father that he would sacrifice £10,000 of his own money and relinquish his own large debt and the debt of the bank, which debts would, if they were substantiated, diminish greatly the dividend that would be coming to the general creditors, and that, instead of taking a dividend out of the small assets which existed, he would release the estate from those large claims, and would contribute for the benefit of the creditors a donation of £10,000. I am asked now, upon what are called informalities in these proceedings, for the objections are no better than that—substance there is none in any one of them—to decide against these creditors, who have an opportunity of getting £10,000 to divide among them, and thus to make a dividend (and not an unreasonable dividend as times go) and to decide in favour of the Appellant, who says he insists upon having the bankruptcy go on. It would be against the meaning of the Act of Parliament, against all its provisions, and directly opposed to the procedure which is established under it, if I entertained any such objection. I am of opinion that the objections are wholly unsubstantial. I think the Registrar performed his duty properly, and that the learned Judge, in confirming what the Registrar had done, made the only order which he ought to have made in the case.

Then there is another thing—it is said that the proceedings are irregular because, an adjudication of bankruptcy having been made, the rights of the petitioning creditor, as they are called, ought not to be interfered with by subsequent proceedings for liquidation. I say it was the intention of the statute that the rights of petitioning creditors, whether an adjudication has or has not been made,

should be interfered with, if it is for the interest and for the benefit of the creditors generally that they should be interfered with. And here I find the facts are so plain that there can be no question. I find, too, that the 266th rule has a very direct application to this part of the case. The 266th rule provides in effect that if after the commencement of liquidation proceedings, the Court thinks, for any reason, that the estate of the debtor should be in the hands of the law, should be taken away from him and put into safe custody, the Court may at once adjudicate him bankrupt in order only to accomplish that end; but if afterwards the proceedings for liquidation, which are not interrupted by the adjudication, should be carried to a conclusion, and the wishes of the creditors should be ascertained by their resolutions, then the Court may annul the bankruptcy.

Mr. *De Gex* says that there are only two sections in the Act of Parliament by which the power to annul an adjudication is vested in the Court. Not only is the power vested in the Court by the 266th rule, but, without any special enactment, I do not entertain the slightest doubt that the Court of Bankruptcy has power at any time, for good reasons, to annul any bankruptcy in which an adjudication may have been made.

22 L.D. 438

In my opinion that part of the case is wholly unsubstantial, and for the reasons I have already given both these appeals must be dismissed with costs.

I omitted to say that with respect to the registration of the two *ultrà vires* resolutions the recent case of *Ex parte Browning* (1) is conclusive. Even if I had not the authority and assistance derived from that decision, I should order the remaining resolutions to be rejected. I think it is competent for the Registrar to reject from any number of resolutions brought to him those which he thinks are *ultrà vires*.

Solicitors for the Appellant: Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Rushton & Co., Bolton.*

Solicitors for the Debtor: Messrs. *Lawrance, Plews, & Co.*

Solicitors for the Trustees: Messrs. *E. F. & B. Davis.*

(1) Law Rep. 9 Ch. 583.

V. C. H. 1874 *July* 8, 9, 10, 11; *Aug.* 1.

DOWLING *v.* PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY COMPANY.

[1872 D. 86.]

Railway Company—Lands—Construction of word "delineated"—Land not inclosed on every side by Lines—Notice—Accommodation Works—Railways Clauses Act (8 *Vict. c.* 20), *s.* 16—*Small Excess of Powers.*

12 L D 278

A railway Act empowered the company to take lands delineated on the deposited plans and described in the book of reference:—

Held, that where the boundary of a plot was left unclosed outside the limits of deviation, the company might at any rate take up to the limits of deviation:

Held, also, that the word "delineated" could not be limited to mean surrounded on every side by lines, but that it meant sketched, or represented, or so shewn that landowners would have notice that the land might be taken.

Evidence (not before the Committee of Parliament) was admitted to prove boundaries beyond those shewn on the deposited plans, and was used in determining the extent of the "lands delineated."

Evidence of engineers, as experts, on the construction of the plans and of the Act was not admitted.

The company, in order to avoid the necessity of completely blocking up the Plaintiffs' entrance, took land of theirs to divert a road so as to diminish the obstruction:—

Held, that such land was necessary for the purposes of the Act, though the Plaintiffs did not desire the diversion of the road, and objected to their land being taken for the purpose.

The deposited plans and book of reference shewed a small plot, No. 38, nearly surrounded by a large plot, No. 37. The schedule to the notice to treat mentioned 37 but not 38, and the accompanying plan omitted both the number and the boundary of 38. The painted area on the notice plan in fact covered the site of No. 38, and this fact was known to the Plaintiffs long before they pointed out the objection:—

Held, that the notice was sufficient under the circumstances to entitle the company to take 38.

Where a railway company was bound by its Act to make a good and sufficient siding on a specified field of an owner who had opposed the bill:—

Held, that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field.

Where a railway company takes land in excess of its powers, *semble*, the Court will not grant relief by injunction if the quantity and value of the land are extremely small.

IN 1865 a bill was introduced into Parliament for the purpose of authorizing the construction of railways called the *Pontypool*,

Caerleon, and Newport Railway, part of which, according to the plans deposited, would have to pass over land forming part of an estate called *Llantarnam Abbey*, of which the Plaintiff *Frances Mary Ann Dowling* was equitable tenant for life in possession, and the Plaintiff *Reginald Blewitt Dowling* equitable tenant in tail in remainder, the legal estate being outstanding in mortgagees. The Plaintiffs opposed the bill in Parliament unsuccessfully, but for their protection the 32nd section of the Act was introduced, which, so far as is material to the present question, was briefly as follows:—

"32. Whereas it is expedient to make provision for the protection of the estate, therefore, except as otherwise mutually agreed between the company and the owner for the time being, the following provisions shall be observed by the company:

"1. The company in field No. 34, on land to be provided by the owner of the estate, shall make for the use of such land a good and sufficient siding.

"2. In constructing the railway No. 1 across road 64 and plantation 65, the company shall not bring any of the railway westward of the centre line of railway shewn on the deposited plans."

"4. The company shall not take more land from the owner of the said estate than is required for the railway and works."

The side of the railway described as "westward" was the side on which the Plaintiff's lodge is shewn on the plans.

The other material parts of the Act as regards the present question were as follows:—

The Act recited that plans and sections of the railways, shewing the line and levels thereof, with books of reference to the plans containing the names of the owners and lessees, or reputed owners and lessees, and of the occupiers of the lands through which the said railways would pass, had been deposited with the Clerk of the Peace for the County of *Monmouth*.

Sect. 2 incorporated with the company's Act the *Companies Clauses* and *Lands Clauses* and *Railways Clauses Consolidation Acts*, 1845; the *Lands Clauses Consolidation Acts Amendment Act*, 1860; *Companies Clauses Act*, 1863; Part 1, and, so far as applicable, Parts 1 and 3 of the *Railways Clauses Act*, 1863.

Sect. 20 limited the exercise of the compulsory powers of pur-

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

chase to three years from the passing of the Act (5th July, 1865).

"Sect. 23. It shall be lawful for the company, subject to the provisions in this and the incorporated Acts and parts of Acts contained, to make and maintain the railways hereinafter described, with all proper works, approaches, and stations in the line and upon the lands delineated on the said plans and described in the said book of reference, and according to the levels described on the said sections; and the company may enter upon, take, and use such of the said lands as shall be necessary for such purposes."

By two amendment Acts passed in 1868 and 1871, the compulsory powers given by the Act of 1865 were extended first till the 5th of July, 1870, and afterwards till the 1st of August, 1873.

The accompanying plans, marked Deposited Plan I., II., III., IV., are portions of the deposited plans. The red ink letters A, B, D, E, G, N, on Deposited Plan I., formed no part of the deposited plan, but were additions to a copy made for convenience of reference, on a question referred to below.

The book of reference contained, among other particulars, the following, relating to parcels of which *Frances Dowling* was stated to be owner, and *Richard Brooks* lessee and occupier:

No. on Plan.	Description of Property.	No. on Plan.	Description of Property.
..	..	39	Wood and footpath.
..	..	..	..
..	..	..	..
34	Arable.	..	..
35	Arable.	65	Wood.
36	Pasture.	66	Plantation, carriage drive, and pasture.
37	Arable and footpath.		
37A	Occupation wall.	68	Coal yard.
38	Wood.		

On the 4th of July, 1870, there was served on the Plaintiff, the tenant for life, a notice to treat, dated the 1st of July, 1871, with four plans and a schedule annexed thereto.

The notice, omitting formal parts, was in the following terms:—

"In pursuance of these Acts the company hereby give you notice that they require to purchase or take the lands of which the particulars are in the schedule hereto, with the appurtenances, and which said lands so required are for the better description

thereof delineated on the plan attached hereto or delivered herewith, and are thereon distinguished by a red colour, and which lands the company are authorized to purchase or take."

The schedule contained, among other particulars, the following:

Number in Map or Plan and in Books of Reference deposited with the Clerk of the Peace for the County of Monmouth.	Description of the Lands required.
..	..
..	..
..	..
34	Part of arable.
35	Part of arable.
36	Part of pasture.
37	Part of arable.
39	Part of wood.
..	..
..	..
..	..
65	Part of wood.
68	Part of waste ground.

The schedule did not mention 37A or 38.

One of the plans bore the inscription:—"*Pontypool, Caerleon, and Newport Railway,* No. 1. Property required from *Mary Ann Dowling* coloured red, and containing 9A. 3R. 16P., in the parish of *Llanvihangel, Llantarnam,* in the county of *Monmouth.*"

The accompanying plans, marked Notice Plan I. and II., are portions of this notice plan.

It appeared that in order to carry the *Newport* and *Pontypool* road over the railway, it would be necessary to raise its level opposite to the lodge entrance of the Plaintiffs' park (shewn in deposited Plan I. by a dark cross), by several feet, so as practically to block it up. The Plaintiffs objected to this, and some discussion followed, the result of which was that the company found it impossible to avoid raising the road, and, with the view of satisfying the Plaintiffs, proposed to deviate the road away from the lodge to the extent of about half the width of the road, the Plaintiffs insisting that they did not desire this alteration, and that it would, in their opinion, leave the approach to the

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

lodge so bad as to be practically useless. The Plaintiffs also insisted that the notice served on them was in excess of the company's powers and void, and they did not send in any claim in answer to the notice to treat. The company made a deposit of £2493, the amount of the valuation of *Evan W. David*, a surveyor appointed by the Board of Trade, and gave a bond under the 85th section of the *Lands Clauses Consolidation Act*, 1845.

The bond was dated the 18th of January, 1872, and recited that the company were desirous of entering upon, taking, and using certain lands referred to in the maps or plans and books of reference deposited with the Clerk of the Peace of the county of *Monmouth*, and designated by the land numbers [here followed numbers agreeing with the schedule to the notice to treat, and not including 37A or 38], and reciting the appointment of *Evan W. David*, and that he had determined the value "of the interest in the said lands," which *Frances Dowling* was enabled to sell, to be £2493, and the bond then proceeded in the usual form.

The company having purported to put their contractors in possession of the lands comprised in the notice to treat, and having staked out the centre line of their intended railway, the Plaintiffs, on the 17th of May, 1872, filed the original bill against the company, alleging that the notice to treat comprised lands which the company were not empowered to take, and praying a declaration that the notice to treat and all proceedings founded on it under the 85th section of the *Lands Clauses Consolidation Act*, 1845, were void, and an injunction to restrain the company from taking or remaining in possession of the Plaintiffs' land, and from carrying the road across the railway in a manner inconsistent with the 32nd section of the Act of 1865.

A motion for injunction was ordered to stand over for further evidence and for cross-examination, and ultimately was ordered to stand to the hearing of the cause.

On the 17th and 30th of July, 1872, shortly before the expiration of their extended powers, the company served on the Plaintiff, *Frances Dowling*, two further notices to treat, describing additional lands which they required to take.

The bill was then amended by stating these notices, and praying as to one of them similar relief on similar grounds to that prayed

by the original bill, and also praying, in addition to the relief originally prayed, a declaration that the Plaintiffs were not entitled to take the land numbered 38 in the deposited plans and books of reference, and an injunction extending to that land also.

The case made by the bill was—

1. That the notice to treat included lands which were not delineated in the deposited plans or described in the books of reference, and, therefore, not within the company's powers, several portions being specified of which it is sufficient to mention 35 and 36 as types.

2. That the notice to treat comprised lands not necessary or required for any of the purposes of the Act, specifying portions of 35, which were proposed to be taken only for the purpose of diverting the road.

3. That the notice to treat comprised lands not necessary or required for any of the purposes of the Act, and which could not be wanted if the provisions of the 1st and 2nd sub-sections of sect. 32 were observed, specifying as an instance of land excluded by the 1st sub-section (as to the siding) the land 34 in the notice plan, and as land excluded by the 2nd sub-section (that no part of the railway or works should be to the west of the centre line shewn on the plan) the land numbered 65 and 68 in the notice plan.

4. That the company had, since the filing of the original bill, entered into possession of No. 38, which was not mentioned in the schedule to the notice, nor shewn by a boundary or number on the notice plan.

The company by their answers alleged—

That all the lands comprised in the notice to treat were lands "delineated on the said deposited plans and described in the said book of reference:" that they were all necessary for the purposes of the company's Acts, and were not excluded by the provisions of sect. 32: that the land No. 38, being about three perches, was necessary to be taken into calculation to make up the acreage of 9A. 3R. 16P. specified on the notice plan: that No. 38 was included in Mr. *David's* valuation: that the omission of it from the schedule was by inadvertence and an error: and that the omission was known to the Plaintiffs at the time of filing the original bill,

V.-C. H. 1874

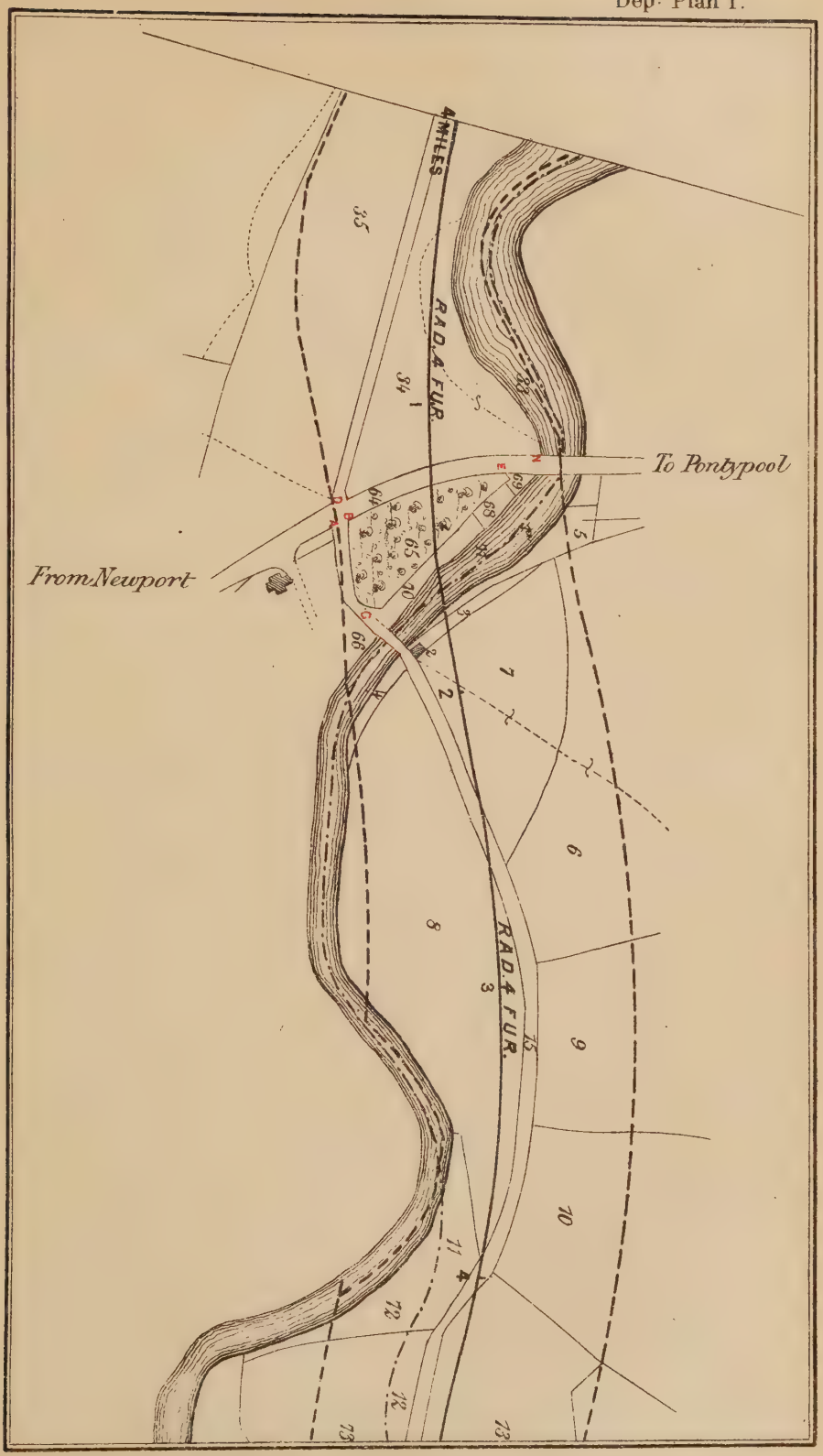
DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

though first mentioned in the amended bill. The allegation as to the valuation was not supported by Mr. *David's* evidence.

On the cross-examination of the company's engineers it was admitted that the possible error of computation in the 9A. 3R. 16P. might be as much as sixteen perches, though probably in excess.

Upon the first point, viz., the extent of land "delineated upon the deposited plans and described in the book of reference," affidavits were filed by the company stating that on surveying the estate, beyond the portions shewn on the deposited plans, it appeared that the whole of the land No. 35 coloured in the notice plan fell within the actual boundary of the same field of which part only was shewn on the deposited plans, and that the field fence and the road boundary in fact met just at the extremity of the triangular slip coloured in the notice plan. Evidence was also given by the engineers of the company and other eminent engineers, to the effect that the lands comprised in the notice plan were delineated on the deposited plans in the ordinary way and in accordance with the model plan in the Standing Orders. These expert witnesses were cross-examined. The substance of their cross-examination on this point was as follows:—

Mr. *Wilson*, the engineer of the company, after referring to a print of the evidence taken before the committee on the bill, stated that he knew of no evidence being given as to the boundaries of fields on the Plaintiffs' estate beyond what was furnished by the deposited plans. On the general question of the construction of the plans he stated, on cross-examination, that a dotted line with a hyphen was a boundary line, but a dotted line without a hyphen was not, and that the limits of deviation line was not to be regarded as a boundary line at all; and that, for example, in order to ascertain the area covered by No. 36 (Dep. Plan II.) you ought to consider the dotted line with a hyphen and the limits of deviation line taken out of the plan as regards the purchase of land: that the plan did not shew him how far No. 36 would go: that he did not consider the letter M in *Llantarnam* included in No. 36, as shewn by the plan: and that he could not tell how much of No. 36 he considered to be so included. He added, that his explanation about dotted lines was applicable to the plans generally; and, on re-examination, said that a dotted line was not


4 MILES
RAD. 4 FUR.
RAD. 4 FUR.
To Pontypool
From Newport
35
84
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22
69
68
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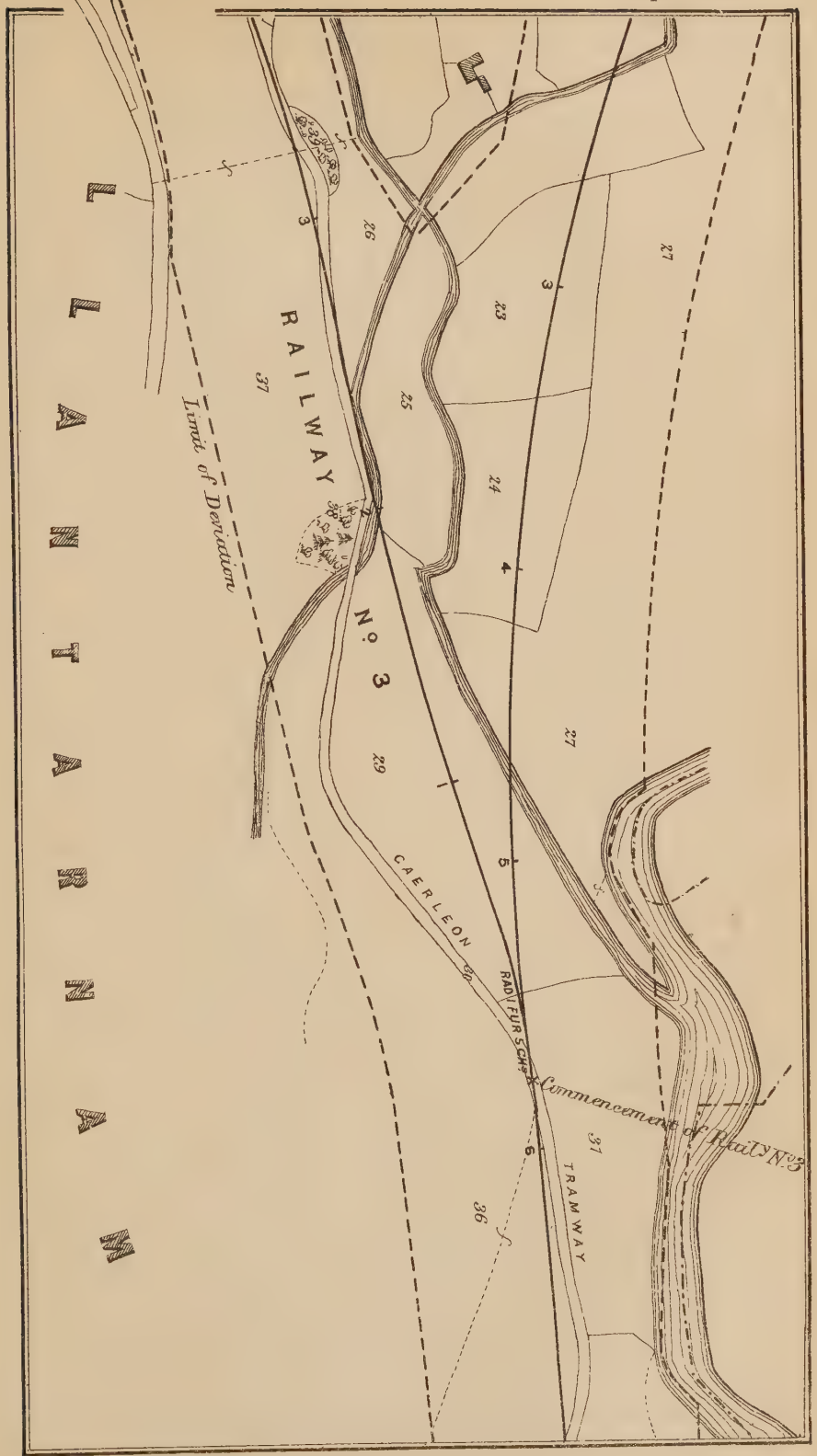
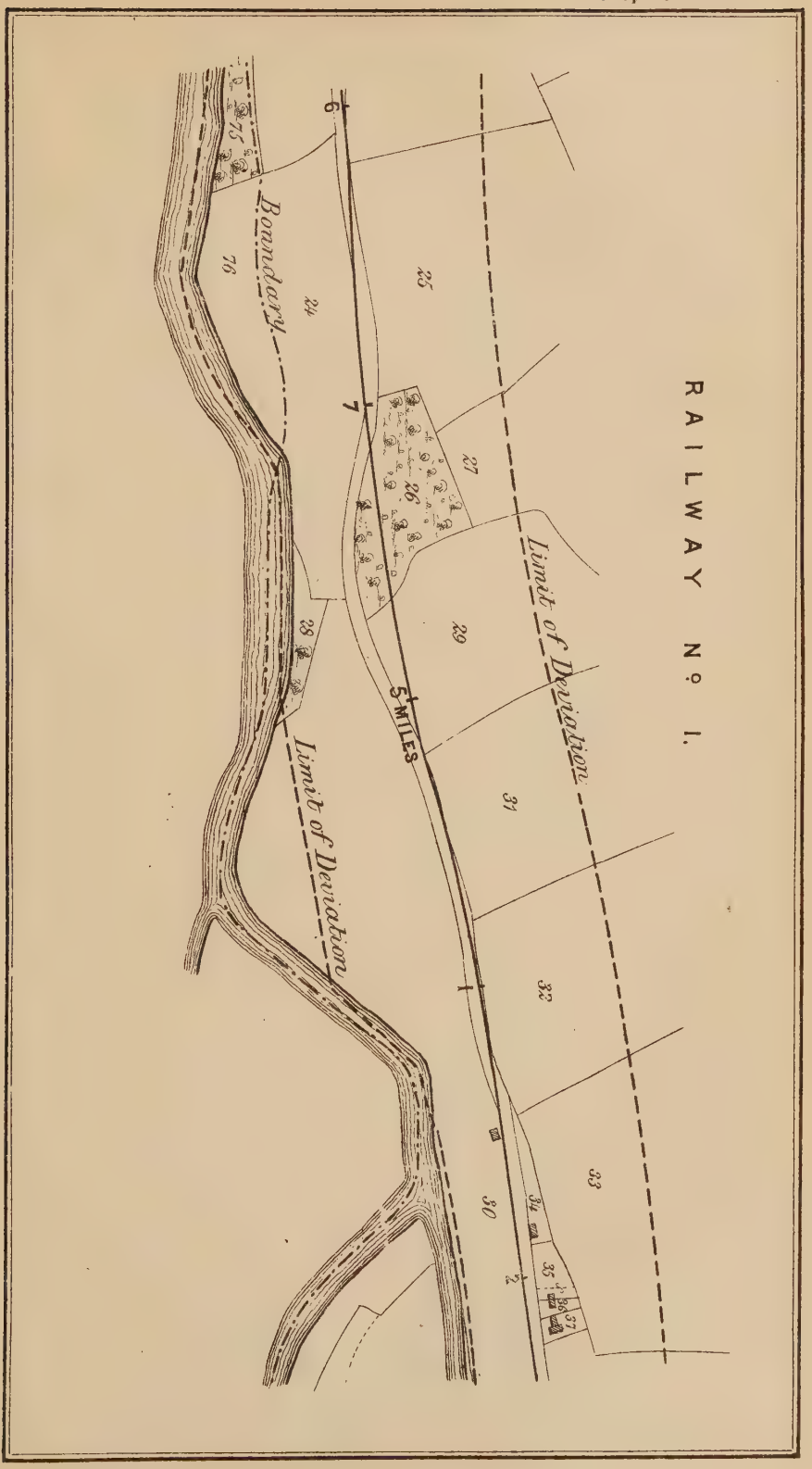
Dep^d Plan II



To follow Dep. Plan I.


RAILWAY No I.
Limit of Deviation
Boundary
Limit of Deviation
5 MILES
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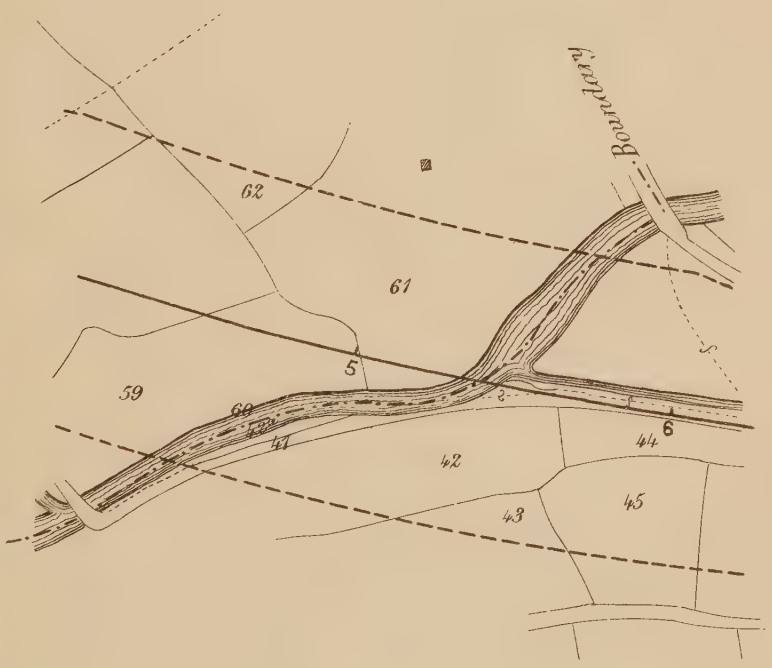
Boundary
62
61
59
5
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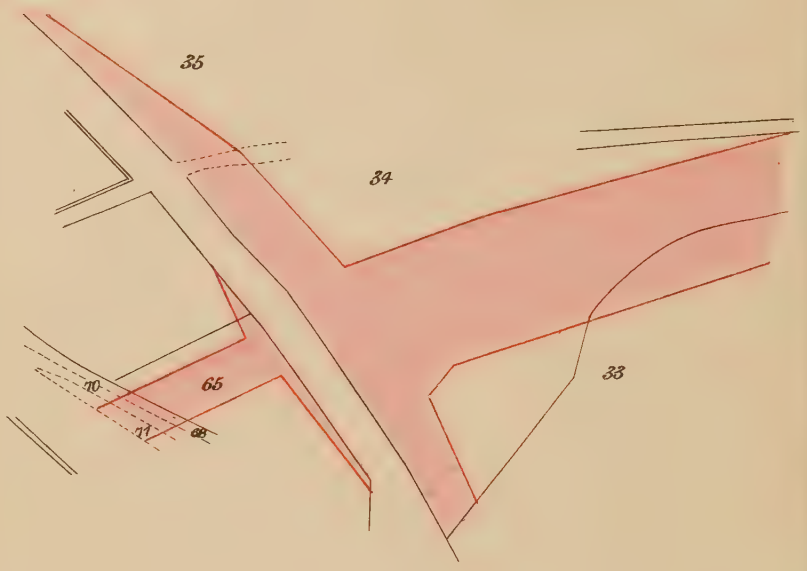
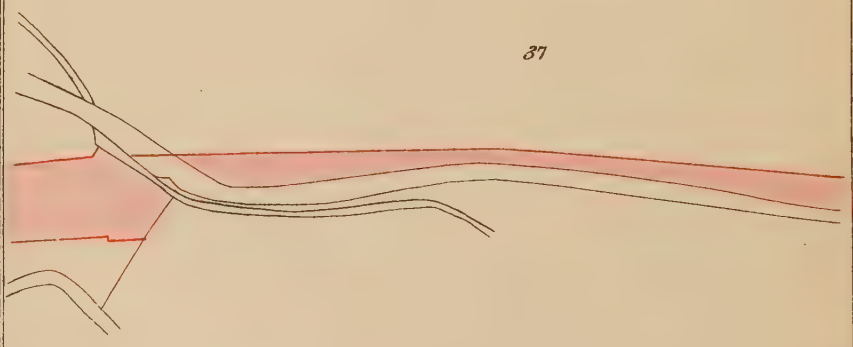
45
6

Notice Plan I.



Notice Plan II.



necessarily a boundary line, and that if it was a road or a path without fences it was not so; and that the dotted line round No. 38 indicated a little bit of scrub without a fence, which would hardly be shewn on the notice plan.

Mr. *James Brunlees*, C.E., stated that it would be a wrong interpretation to say that the land delineated under No. 32 on the plan (Dep. Plan No. IV.) included everything up to the next fence. He considered that the plan did shew a definite quantity of land delineated under No. 32, namely, the quantity which would be included if the extremities of the side boundaries were joined by a straight line. He could not say that competent engineers, generally, would accept his interpretation that the land delineated includes all that lies within a straight line joining the extremities. He considered the principle would apply in every case for the purpose of ascertaining the quantity of land delineated. Being referred to Nos. 42, 43, and 62 (Dep. Plan IV.), he thought the principle would apply to 43 and 62, but that the quantity delineated under No. 42 was quite uncertain. He could not say his principle was generally adopted by engineers, and did not recollect such a question having ever arisen. He had never had occasion to consider what such plans meant in this respect.

If he did not adopt that principle, he could still give a meaning to the words "the land delineated on the plan and numbered 32," viz., "that whenever a field is numbered and referenced, it is open to the company to take the whole, however large it may be." That was the practice of railway companies acting under his advice, but he could not say whether it would apply to parks or commons, and he could not say positively, without reference, whether he had ever had such a case before him, as in the instances which had occurred the whole field might have been delineated. He considered that the land No. 32 was an instance in which the company would be entitled under the *Lands Clauses Act* to take the whole field, however large it might be, though the land delineated stopped according to his view at the straight line joining the extremities.

In looking at a railway plan to ascertain the quantity of land delineated, he thought that it would not be legitimate to consider

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

the limits of deviation line at all, because, in his opinion, the powers of the company extended beyond it.

Mr. *Thomas Elliott Harrison*, C.E., said that for the purpose of delineating the land to be taken he disregarded the limits of deviation altogether. That as to No. 32, no definite quantity of land was delineated, but there would be if the extremities of the sides were joined by a straight line. He had never had occasion to consider such a case, and could not say whether that was a correct principle of interpretation. Nor did he know of any common understanding among engineers to that effect. It was the practice of railway companies to purchase land beyond the limits of deviation, though he did not remember a case of their doing so where the owner objected. Being asked whether this was done on the straight line principle of interpretation, he replied, "No, I cannot say they acted on that principle. I have always acted on the principle of taking whatever the company required for their railway." On re-examination, he explained that this was only done where the lands were numbered in the plans and books of reference. He had never himself been guided by the principle of joining the extremities by a straight line, and did not know of that or any other principle having been adopted by engineers.

Being asked if a definite delineated area might not be obtained by imagining the boundary lines on the plan to be produced till they met, he answered, "You mean, assuming that the lines so produced were the actual fences? The question is not a practical question." He knew of no understanding among engineers that in the case of a field like No. 25 (Dep. Plan III.) the plan was to be understood as meaning the same as if the boundaries of the field were completed.

Mr. *Charles Richard Chaffins*, Engineering Surveyor, on being referred to Nos. 25, 27, 29, and 31 (Dep. Plan III.), said that he could not say how much was delineated under 27 and 31, but he could approximately under 25 and 29 by prolonging the sides. But he could not say that principle applied to all cases of converging boundaries, and could not lay down any general principle. There was no such principle, but he thought there would be a general principle as to Nos. 25 and 29, "having regard to those

particular figures." This was only an opinion. He could not state it positively. He had never had the question brought before him until this cross-examination. Being asked whether he gave his opinion as to Nos. 25 and 29 as an arbitrary opinion, or guided by any principle of interpretation as some ground for it, he replied, "I cannot understand the question; I can lay down no general principle."

The evidence as to the alteration of the road was, that it had been diverted or, as the engineers called it, slewed to the extent of about half its width away from the Plaintiffs' land; that this was done for the purpose of promoting the Plaintiffs' convenience, but not at their request or with their approval; that the diversion was not shewn on the deposited plans, but was an afterthought, and that some of the land included in the notice to treat was not required for any other purpose than the diversion of the road, which the company alleged, and the Plaintiffs denied, to be a legitimate purpose for which land could be taken.

The evidence with respect to the siding was, that enough of No. 34 was left to allow of a siding, otherwise sufficient, being made, but that all that side of No. 34 which abutted on the high road was proposed to be taken, and, therefore, a siding could not be constructed on the remainder of 34 with access to the road, unless by crossing the strip of land which the company proposed to take—which could only be done by the permission of the company—or by making a circuit through other lands beyond No. 34.

The evidence on the question whether any part of the land comprised in the notice, and taken by the company for the purpose of their railway, was to the westward of the centre line, as shewn on the deposited plans, was conflicting.

The company's witnesses stated that the western fence which they had erected in No. 65 exactly coincided with the boundary shewn on the notice plan, and also with the centre line shewn on the deposited plan, and that this land was taken for the railway itself, and not for stations; so that they had gone up to the verge of, but not beyond, the limit prescribed by sect. 32, subsect. 2. The Plaintiffs alleged that the fence and the boundary on the notice plan were both to the west of the centre line

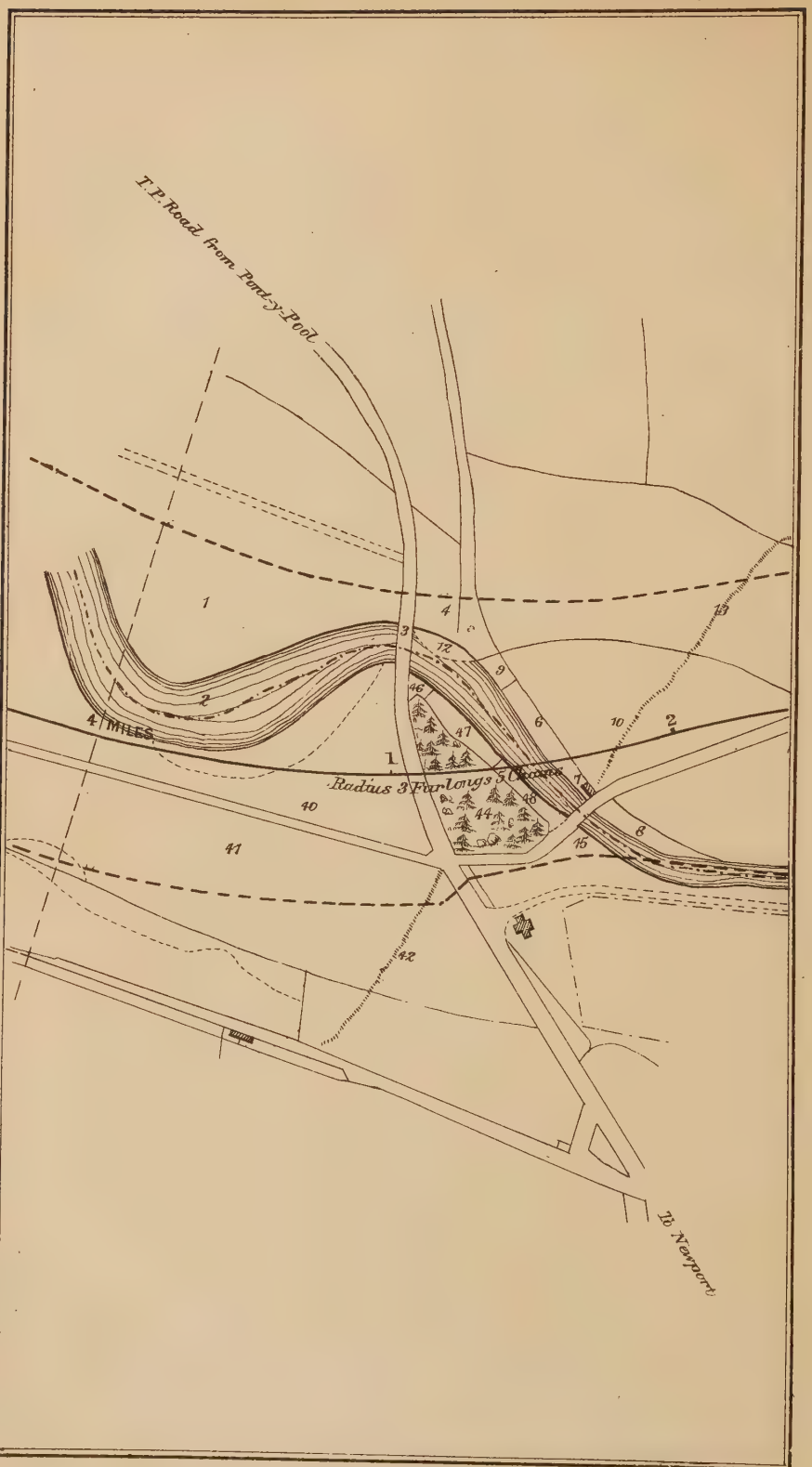
V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

shewn on the deposited plan. In order to test this measurements were made on behalf both of Plaintiffs and Defendants, from which it appeared that there were errors in the deposited plan, such that it was impossible to set out upon the ground or upon a perfectly accurate plan a line corresponding with the centre line shewn on the deposited plan. The Plaintiffs' witnesses tested the position of the actual fence by measurements from a number of fixed points on the ground which ought to have corresponded with points shewn on the deposited plan. Those points (marked in red on Dep. Plan I.) are A, corner of park wall; B, D, and E, corners of hedges; G, a point on park wall at a known distance from A and N corner of abutment. The result of their evidence was, that if tested from the point B the railway fence was very slightly to the west of the prescribed line, but if tested from any of the other points it came out in every case to the west of the centre line shewn on the plan, by distances varying from seven to twenty links.

The evidence of the Defendants was that the measurements from B shewed no trespass at all, and that none of the other points were proper points to measure from—as to A, because it was outside the limits of deviation, as to G, because it depended on A, and as to the other points, on account of alleged want of definiteness in them. The Plaintiffs' witnesses, however, alleged that A was a more definite point than B, and not less accurate, though the limits of deviation were drawn within it, and also insisted on the superior definiteness of their other test points.

It was not disputed that there was an error in the distance of A from B of about fifteen links, which the Defendants' witnesses attributed to the point A, while the Plaintiffs' witnesses attributed it to the point B, and relied on the partial confirmation obtained from the remaining points. A plan was produced of the same ground, containing the same error, which had been prepared some years before for the purpose of a projected railway, intended to be called the *East Usk Railway*, and the witness who produced it stated that a copy of it had been borrowed from him at the time the Defendants' railway was in contemplation, and that from this and from internal evidence, he could see that the Defendants had used his plan as the basis of their deposited plans.


T.P. Road from Pond-y-Pool
4 MILES
Radius 3 Furlongs 5 Chains
To Newport

To face 725

The accompanying plan, *East Usk Railway* Plan, is a portion of this plan.

As to the piece of land No. 38, it appeared from the evidence that by careful measurement of the land coloured red in the notice plan and numbered 37, it could be ascertained that it included part of No. 38 (see Notice Plan II.) It also appeared that the Plaintiff, *R. B. Dowling*, had before the original bill was filed, at his solicitor's suggestion, noted on the plan the figures "38, 37A," intended to signify that it was defective in respect of No. 38 and 37A, but the Plaintiff stated that he did not then understand exactly what the defect was; and the first occasion on which the fact that part of No. 38 had been entered upon was distinctly stated, was on the cross-examination of the company's engineers, after the filing of the original bill and before the filing of the amended bill.

Mr. *Hemming*, and Mr. *W. G. Robinson*, for the Plaintiffs:—

The Plaintiffs' case is, that the Defendants, the railway company, have given notice to take land which they are not authorized by Parliament to take, and have, on the footing of that notice, entered under the 85th section; and that they have also entered upon other land not comprised in their notice to treat, or in the bond given under the 85th section. It is a well-established rule of this Court that public companies must be kept strictly within the powers conferred upon them, and that if they wish their powers enlarged they must go elsewhere for it, and will not get enlargement from this Court by way of construction: *Webb* v. *Manchester and Leeds Railway Company* (1); *Gray* v. *Liverpool and Bury Railway Company* (2). We say that the company have given us a notice to treat including land, which under their Act they had no power to take. If we prove this, the consequence must be that the notice to treat is wholly void, because the notice gives the owner no option to treat for anything less than the whole of the lands comprised in it. If it includes too much, therefore it cannot be good for the rest, but must fail altogether, and with it the power of entering under the 85th section, which depends on the existence of a co-extensive valid notice to treat,

(1) 4 My. & Cr. 116. (2) 9 Beav. 391.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

must fail too; and the company must go out of possession till they perfect their right by giving a valid notice to treat. This was settled by the case of *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1), which will be cited presently, as being on all fours with the present case on the question of what are delineated lands within the Act. *Stone* v. *Commercial Railway* (2) also applies.

The effect of excess in the notice to treat being to deprive the company of all right to enter upon any land at all, the next question is whether there has been such excess. We say there has in several instances, and to establish this we have first to shew, as a matter of construction, what was the limit of the powers conferred by the Act, and then to prove that the notice exceeds them.

On the first point a preliminary question arises as to the evidence admissible for the purpose of putting a construction on the Act. The terms of the section by which the powers are given are that the company may take and use such of the lands delineated on the deposited plans and described in the book of reference as shall be necessary for the construction of their railways and works. To construe the Act, therefore, you must look at the plans and book of reference. In this case the company have filed affidavits shewing the boundaries and details of a field, No. 35, outside of what is shewn in the deposited plans and book of reference, although it appears in evidence that the Committee of Parliament had no materials before them except those furnished by the deposited plans. We submit, therefore, that the Court in construing the Act will not look at plans which are not referred to in the Act and were not present to the mind of the Legislature in passing it, and that the affidavits I have mentioned should not be received on the question of construction: *North British Railway Company* v. *Tod* (3); *Beadmer* v. *London and North Western Railway Company* (4). There have also been filed affidavits by engineers, stating what construction they put on the plans and on the words of the Act, "lands delineated on the said plans," as applied to the lands in question. We submit that a plan is not like a foreign

(1) 4 Giff. 352; 9 Jur. (N.S.) 710.
(2) 1 Railw. Cas. 375.
(3) 2 Cl. & F. 722, 732.
(4) 1 Mac. & G. 112.

language or the conventional language of a trade, and that the Court can and will construe an Act of Parliament referring to a plan without admitting the evidence of so-called experts. Perhaps the proper time of raising these questions would be when the evidence is tendered by the Defendants, but if the Court should think fit to state its view now it will facilitate the opening of the case.

[The VICE-CHANCELLOR said he considered that the affidavits and plans could not be wholly rejected, although parts thereof might appear to be inadmissible. The evidence was accordingly read and discussed *de bene esse*. Ultimately the Vice-Chancellor declined to admit the evidence of the engineers given as experts, and admitted the evidence to shew the boundaries of No. 35 beyond what appeared on the deposited plans.]

Then the first cases of excess in the notice to treat are those furnished by several plots, of which No. 36 (Dep. Plan II.) is a type.

The opinion of all the expert witnesses is that the limits of deviation line is not to be regarded at all as a delineating line, and that the plan is to be understood as if that line were not there. This view is supported by *Doe* d. *Armistead* v. *North Staffordshire Railway Company* (1), and *Doe* d. *Payne* v. *Bristol and Exeter Railway Company* (2). If you imagine the limits of deviation line removed, there is nothing which can possibly be said to be delineated under the number 36, and, therefore, nothing which the company can take under that enumeration. But the notice to treat claims land under that number, and is therefore void, although the land so claimed does in fact lie within the limits of deviation line, and might be taken if that line could be legitimately referred to as a delineating line.

The VICE-CHANCELLOR:—Will my judgment on this point prejudice the other part of the case?

Mr. *Hemming*:—No, Sir. As far as I am concerned, it will be an assistance to me.

The VICE-CHANCELLOR:—Then I will dispose of this point at once. In this case the company required for the purposes of their

(1) 16 Q. B. 526, 537. (2) 6 M. & W. 320.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

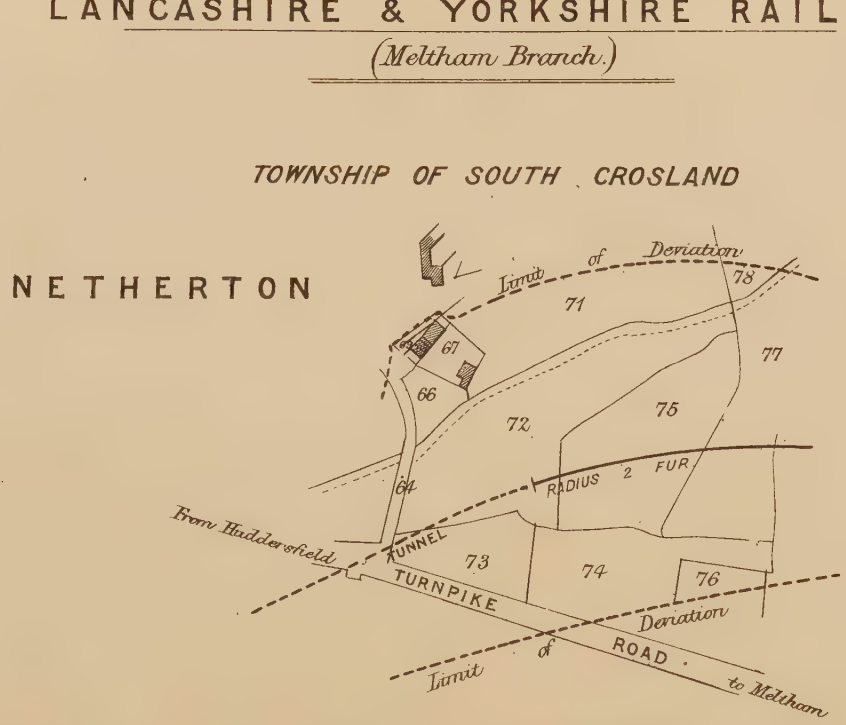
railway, among other pieces of land, part of a piece of land marked No. 36 on the deposited plans. The railway was incapable of being constructed according to the deposited plans without taking part of that piece of land. It is said, however, that it is not sufficiently within the 23rd section of the company's Act, as it is not delineated on the plan and described in the book of reference. I say nothing now as to how much of this land the company may be entitled to take, but I think they may take it at least as far as the limits of deviation—far enough, to enable the company to construct their line according to the original design. The case, *Doe* d. *Armistead* v. *North Staffordshire Railway Company* (1), cited by Mr. *Hemming*, is really a case against his contention, for Mr. Justice *Patteson* in that case says (2): "It was assumed at the trial that the company were entitled to take at all events what was within the line of deviation." In this case, therefore, I must hold that the company were in like manner entitled to take No. 36.

Mr. *Hemming*:—Then I will next call attention to No. 35, which extends beyond the limits of deviation, and is not covered by the judgment of the Court. The portion of No. 35 included in the notice to treat extends far beyond the cross-road (or tramway I believe it is) which separates No. 34 from 35 (Notice Plan I.). The limits of deviation line is seen by the deposited plans (Dep. Plan I.), which are on half the scale of the notice plans, to lie along the tramway, so that a long triangular slip of No. 35 claimed by the notice lies outside of the limits of deviation. The question is, whether this portion of No. 35 is delineated on the deposited plans. In the first place, we say that the dotted line being without a hyphen is a delineating line, and that leaves a portion of what is claimed under the notice outside of the delineated area. Even if it should be said that this dotted line is not to be taken into account, still the case is clear. Let us assume that the dotted line is not there, and that the boundary is unclosed. Then, looking at Dep. Plan I., and reading it by the light of the decision just given, it is clear that the whole area of No. 35 within the limits of deviation line is delineated by the help of that line, and is within the statutory powers. But when you look at any

(1) 16 Q. B. 526, 538. (2) 16 Q. B. 538.

LANCASHIRE & YORKSHIRE RAILWAY.

(Meltham Branch.)



To face 729

portion of No. 35 beyond that line, you find it impossible to say what, if anything, is so delineated. There is only one rational construction to be put on the language of the Act and the plans, and that is to say, that where (as, for example, in No. 45, Dep. Plan IV.) you have a plot of land completely inclosed within boundary lines, irrespective of the limits of deviation line, there the whole of that plot is "delineated on the plan," and may be taken; but that where no complete boundary is drawn (as in No. 36), there you may call in aid the limits of deviation line, and use that to complete the delineation. This, in fact, is the principle on which the plans are obviously drawn, because you never find an instance of an incomplete boundary inside the limits of deviation, although such boundaries are the rule, and not the exception, when once the limits of deviation line is passed. This is not merely a natural construction, but the only one which will free the plans and the Act from ambiguity, and we submit that it is the true construction. This was so held in *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1). The reports are not very full and have no plans, but we have obtained a verified copy of the deposited plan in that case (see *Meltham* Railway Plan), which shews that the decision is on all fours with our contention as to No. 35. There the notice to treat was for a portion of No. 71 lying partly inside and partly outside the limits of deviation line, and it was held that the notice was void.

While we submit this as the right interpretation of the plans, there are other constructions which have been suggested by the Defendants' witnesses and which would equally serve our purpose. Mr. *Wilson*, the company's engineer, candidly admits that when once he passes the limits of deviation in a case where the boundaries are left open he cannot say how much is delineated. Mr. *Brunlees*, indeed, suggests that you may complete the delineation by drawing a straight line between the extremities of the side boundaries. We need not, and do not, object to this, for the application of that rule would still leave part of the land in the notice plan undelineated, and would, therefore, prove our case. But this mode of interpretation is repudiated by other witnesses, and seems to have little reason to recommend it and no authority,

(1) 4 Giff. 352; 9 Jur. (N.S.) 710.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

for Mr. *Brunlees* does not profess to express anything more than a hasty opinion or guess of his own hazarded on the spur of the moment.

Another conceivable, but absurd, interpretation, is to say that if any corner of a piece of ground, however large, is shewn on the deposited plans, Parliament meant to consider everything as delineated up to the next fence, and to extend the powers of the company to that distance, without having any idea whether it was conferring powers over 100 yards or 100 miles. This sort of idea was vaguely suggested by some of the witnesses, but energetically rejected by others, and seems too idle to deserve consideration.

Some other vague suggestions were made, but the result is simply this, that you must either adopt a construction which excludes this land No. 35 in the notice plan or else refuse to construe the Act at all. And this is what the Defendants will ask you to do. Their line of defence is indicated by the evidence they have given. They will not propose any rival interpretation to ours, because there is no possible interpretation that will help them; but they will in effect ask you to abstain from saying what the Act does mean, and to say simply that whatever it may mean, it means enough to deprive the Plaintiffs of their land.

Then (failing this rather desperate argument) they will fall back upon one still more desperate, and say that if they have with a high hand taken land which they had no power to take, it is only a very small slip of little value, and they ought to keep it. That contention surely answers itself. A landowner is entitled to keep all his land, and though the value of these plots might be small to other persons, it is by no means small now that the company are in the market as purchasers. It does not follow because there is only one purchaser who wants the land, that he is to fix his own price and compel us to sell at it.

That is our case as to No. 35.

Then we say, further, that the notice is in excess in claiming to take land which is admitted not to be necessary for any purpose except for the deviation of the road. That deviation is not desired by us, and it is confessedly not indicated on the deposited plans,

and not wanted except to gratify a supposed desire on our part to have our convenience consulted. You cannot render works necessary under pretence of consulting a man's convenience against his will. A company cannot divert a road without first acquiring the land on which they mean to put it, and such land can only be taken if it is necessary for the purposes of the Act, and we say this was not so: *Reg.* v. *Wycombe Railway Company* (1); *Rangeley* v. *Midland Railway Company* (2).

[The VICE-CHANCELLOR:—In *Reg.* v. *Wycombe Railway Company* it is said that the convenience of owners as well as of the company is to be considered.]

Yes, but it is not said that you are to consider their convenience against their will.

We say, again, that the notice is in excess in claiming to take so much of No. 34 as to make it impossible to construct a siding with access to the road over No. 34. No siding can be sufficient if we are to depend on the good will of the company to allow us to communicate with the road. On this ground, also, the notice is void, having regard to sect. 32, sub-sect. 1.

Yet, again, we say that the notice is in excess for claiming to take land for the construction of the railway itself, to the westward of the centre line as shewn on the deposited plan. It is to be remembered that this plan was produced to the Committee by the company and verified by their engineers as a true plan. If it turns out, as it has turned out, to be so incorrect and inconsistent with itself as to leave it doubtful where that centre line is upon the ground, we may read it against them, and if from any one fixed point shewn on that plan we shew a trespass beyond the limit imposed by sect. 32, sub-sect. 2, we are entitled to hold them to their own statement that the plan is correct. Even if this is not conceded, we are at least entitled to take the average position of the centre line as shewn by all the available fixed points on their plan, and that method would equally prove an excess to the westward. In fact all the test points give results in our favour (and this is not denied) except one, and that an ill-defined hedge, as to which it is doubtful whether it shews

(1) Law Rep. 2 Q. B. 310. (2) Law Rep. 3 Ch. 306.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

excess or not. They do not even pretend that that selected point leaves them any appreciable margin.

For all these reasons we submit that the notice to treat was excessive, and, consequently, the entry illegal. One more point remains. Assuming the notice to be good, it is now proved that the company (apparently since the filing of the bill) have entered upon No. 38. Now No. 38 is omitted from the schedule to the notice and from the recital in the bond, and, so far as either number or boundary is concerned, from the notice plan also. They say after careful measurement that the red area in the plan does cover No. 38, although the boundary is not shewn. Probably this is right, but no one could discover it by merely looking at the plan, and until the cross-examination it was not known for certain whether the company meant to take this plot, though we may have suspected that they did. When the original bill was filed the fencing was not complete, and we did not know what they intended to take. Afterwards we found that they had entered on No. 38, and we claimed accordingly by an amended bill. This trespass would not invalidate the notice altogether, but still it alone would entitle us to an injunction to restrain the company from retaining that piece of land for which they have given no notice.

It is scarcely necessary to notice the evidence that the line is nearly completed. It was scarcely commenced when we filed our original bill and moved for an injunction, and it was no fault of ours that the motion stood over. The convenience of the public cannot be set up as a justification for infringing private rights: *Raphael* v. *Thames Valley Railway Company* (1).

Mr. *Dickinson*, Q.C., and Mr. *Cracknall*, for the Defendants:—

This is not a bill filed to protect an individual against aggression by a powerful company, but it is really a bill to extort money; it raises, however, an important question of statutory contract, depending on the meaning of the word "delineated." The words of the statute are, "delineated on the plans and described in the book of reference." The Plaintiffs contend that "delineated" means surrounded on all sides by a line or lines, but there is no

(1) Law Rep. 2 Ch. 147.

authority cited in support of that contention. The object of these enactments must not be lost sight of, and it is this, that the land-owners with whom the company are treating should have reasonable information what is the land the company may require. The Act never intended, nor does it express, that any particular "delineation" must be employed, but the plain meaning is that sufficient information should be given. The answer to the objection that the delineation is not completed by boundaries on all sides is "*id certum est quod certum reddi potest;*" and this is done by our evidence, which proves that the unfinished boundary lines of No. 35 do in fact meet at the extremity of the land proposed to be taken. It cannot be pretended, nor, except as to the diversion of the road, is it seriously argued by the Plaintiffs, that they did not know what were the parcels of land the company required. In fact, if the Plaintiffs are right the company are trespassers, and the Plaintiffs' remedy is in a Court of law: *Deere* v. *Guest* (1). In *Goodson* v. *Richardson* (2), in which *Deere* v. *Guest* was considered, the cases in which this Court will and will not interfere were considered.

As to No. 35, the suggestion that the dotted line is a delineating line is unfounded. Mr. *Wilson*, it is true, says that dotted lines without hyphens are generally boundary lines, but not so where they are footpaths or roads without fences.

Then as to the objection in respect of No. 38, it is obvious that No. 38 extends into No. 37, and forms a part of it. The notice there was sufficient to inform the Plaintiffs of the company's intention to take No. 38, and that was really all the law required; it was, moreover, valued by the surveyor. Moreover, the Plaintiffs knew that we meant to take No. 38 before filing the original bill, and waited till our powers had expired before setting up their case as to that in the amended bill.

Then as to the diversion of the road, the Plaintiffs say that it is unnecessary and inconvenient; but it was for the company to judge what was necessary, though they must do as little injury as possible. In fact the real grievance of the Plaintiffs as to this is that the alteration will promote their convenience, and so lessen the compensation to which they might otherwise be entitled.

(1) 1 My. & Cr. 516. (2) Law Rep. 9 Ch. 221.

V.-C. H. 1874 DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

[They also cited *Carnochan* v. *Norwich and Spalding Railway Company* (1); *Coats* v. *Clarence Railway Company* (2); *Duke of Beaufort* v. *Patrick* (3).]

Mr. *Hemming*, in reply:—

It has been said that the Plaintiffs were silent as to the objection in reference to No. 38 until after the company's powers had expired. The suggestion is that they desired to entrap the Defendants, but the answer is obvious. So anxious were the Plaintiffs not to put the company in a corner, that they filed their bill a few months before the powers expired, stating in it all the objections as to the excess of the notice which the company would have to remove by a fresh notice before the expiration of their powers. After bill filed the company did give fresh notices, and chose not to remove these objections.

The objection as to No. 38 was of a different character, because it was one which the company could remove after the expiration of their powers at any time within six months of the discovery of the error, under sect. 124 of the *Lands Clauses Consolidation Act*. They were therefore in no way prejudiced by the circumstance that this complaint was not put forward in the original bill. The fact is, that it was not till the cross-examination that the Plaintiffs had any sufficient grounds for saying that the company meant to take that land, and it is not alleged that it was in fact entered upon till after the filing of the original bill. It would, therefore, have been premature to raise the point sooner, and if we had desired to prejudice them by withholding any part of our case, we should have suppressed those errors which could not be corrected after the powers had expired, not the one solitary error which the company could equally well have corrected afterwards.

Then, as to the company's right to take No. 38, it is said that because it is partly surrounded by No. 37, therefore the company, having given notice as to No. 37, can take No. 38; but if this principle is admissible on a small scale, it must be on a large scale, and would lead to endless confusion and injustice. No one would know what was claimed under a notice to treat.

(1) 26 Beav. 169. (2) 1 Russ. & My. 181.
(3) 17 Beav. 60.

The company are entitled to enter upon the lands comprised in their notice, and referred to in the bond, and on no others. It is absurd to say that they can enter on any land which they vaguely indicate, without numbers or boundary, by a strip of red paint, the exact limits of which it would be impossible for any one but a surveyor to discover with certainty. The company are not entitled to contradict their notice and bond, which say expressly that No. 38 is not included. As to the pretence that Mr. *David* valued No. 38, though it was not included in the bond, it is enough to say that Mr. *David* is not produced to say so, and that it rests on mere conjecture of officers of the company.

Then as to the diversion of the road: It has been shewn that a company has no power to divert a road, under sect. 16 of the *Companies Clauses Act*, unless it be necessary; but this company claims the right to divert this road on land taken from the Plaintiffs compulsorily, while they render almost useless the Plaintiffs' lodge. It cannot be necessary to consult our convenience against our wishes. It is admitted that the diversion of the road is not wanted by any one other than the Plaintiffs. The Plaintiffs have all along said that they do not want it. Therefore it is not wanted by any one, and not being necessary, land cannot be taken for it.

With reference to the dotted line on No. 35, it is said that that cannot be a boundary (though without a hyphen) because it is a footpath, and unfenced footpaths and roads are not boundaries. But this is founded on a statement extracted from the company's engineer on re-examination, inconsistent with the general rule laid down by him on cross-examination; inconsistent also with the fact that the same dotted line is a boundary line, with numbers on each side of it, in the *East Usk* plan, from which he copied his; inconsistent also with the fact that the dotted line round No. 38 (which Mr. *Wilson* says is not a fence) is a boundary line in his own deposited plans.

With reference to the general principle of interpretation, as I anticipated, no interpretation has been suggested on the part of the Defendants, but they desire the Court to say, by an *ex post facto* construction, that the company may take our lands, though they are unable to suggest any construction which would justify them in doing so. I ask the Court to follow the plain doctrine

V.-C. II. 1874 DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

laid down in *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1). The whole effort of the defence has been to blacken the Plaintiffs, by saying that it is extortion on their part not to let the company take so small a quantity of land as that which they have illegally entered on; but there is no principle on which a company may by main force (under colour of their Acts) dispossess a landowner of any portion of his land.

As to the suggestion that the case is one of trespass to be tried at law, it is enough to say that a long line of authorities has settled that this Court will, even at the instance of a legal owner, always interfere to prevent a railway company from exceeding its powers under colour of statutory right.

Aug. 1. SIR CHARLES HALL, V.C.:—

The Plaintiff Mrs. *Dowling* is equitable tenant for life in possession, with remainder in tail to the Plaintiff Mr. *Dowling*, of the *Llantarnam Abbey* estate, in the county of *Monmouth*. The mansion-house is situated on the turnpike road leading from *Newport* to *Pontypool*, and has an approach by a lodge entrance from the turnpike road along a carriage drive through the park and up to the mansion, and thence to another lodge, on the same road, to *Pontypool*. By an Act of Parliament passed in the year 1865, the Defendant company was empowered to construct a railway which would intersect the turnpike road at a distance of about 100 yards from one of these lodges, which I shall hereafter refer to as the *Lodge*.

The company's Act of Parliament incorporates the *Lands Clauses Consolidation Act* and the *Railways Clauses Consolidation Act*. The 23rd section of the Act empowerd the company to make the railway, and was in these words:—

Sect. 23. "It shall be lawful for the company, subject to the provisions in this and the incorporated Acts, and parts of Acts contained, to make and maintain the railways hereinafter described, with all proper works, approaches, and stations on the line and upon the lands delineated on the said plans and described in the said book of reference, and according to the levels described on

(1) 4 Giff. 352; 9 Jur. (N.S.) 710.

the said sections, and the company may enter upon, take, and use such of the said lands as shall be necessary for such purposes."

The Plaintiffs opposed the bill of the promoters when it was before Parliament, and for their protection there was introduced into the Act of Parliament sect. 32, of which sub-sects. 2, 3, and 4 were in these words:—[The Vice-Chancellor read these sub-sections.]

The Plaintiffs, by their bill, complain that the company has taken parts of their estate which it had not power to take; that it has taken other parts of their estate without giving notice as required by the *Lands Clauses Consolidation Act.* The several parcels of land which the company have taken, and the taking whereof is complained of by the Plaintiffs, are mentioned in the 1st and in the 8th and 9th paragraphs of the Plaintiffs' bill, in which paragraphs such parcels, with one exception, are mentioned by reference to the notices to treat, and one parcel, No. 38, is mentioned by reference to the deposited plans.

The company gave the notices to treat: the second and third notices were given after the original bill was filed, and the Plaintiffs' case, as regards them, was introduced into the bill by amendment. As regards the second notice, which was a notice to take one part only, No. 77, the bill does not make any case against the company. The 6th paragraph of the prayer of the amended bill extends to the lands comprised in all the notices, but there being no case made as to this part, there is no case for relief in respect of it.

The Plaintiffs, by their bill, seek to restrain the company from acting upon their notices to treat, and their case is, that if any parcel has been mentioned in any notice which the company could not take, the notice is altogether bad, and they ask by their bill to restrain the company from taking possession of any part of their estates. The company's notices include many other parcels than those I have above mentioned.

The Plaintiffs' contention—except as to a few small parcels, which I shall separately deal with—is this: they say that the company has taken parcels of land which are not delineated on the said plans and described in the book of reference. The Plaintiffs, indeed, allege in one or two paragraphs of the bill that certain of the lands are not "delineated on the deposited plans or

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

described in the book of reference," seeming thereby to interpret sect. 23 disjunctively. The substance of the contention is, that the lands taken are not such lands as sect. 23 of the company's Act empowers the company to take. They say the Defendants' plans in certain cases have upon them numbers on parcels of land, which parcels are in part only inclosed within lines, and that, inasmuch as there is only a partial inclosure within lines of such parts, they are not delineated and described within the meaning of the 23rd section. To understand this contention, it is, I think, convenient to take in hand one of the copies of the deposited plans (see Dep. Plan I.), and look on those parts of the plan on which there are the numbers 6, 9, and 10. The lands on which those numbers are marked are shewn on the plan as inclosed on three sides, and not on the fourth. By reason of the absence of any line on such fourth side, the Plaintiffs say no part of the lands on which those numbers are placed can be taken by the company. If such be the correct view, Parliament passed a wholly unworkable and useless Act of Parliament, and, instead of authorizing and providing for the construction of an undertaking which would be a public advantage, did practically nothing of any use whatever.

The Plaintiffs contend that, it having been held that the limits of deviation do not prevent a company taking for other purposes than the line of railway lands delineated in the deposited plan outside such limits, *Doe* d. *Payne* v. *Bristol and Exeter Railway Company* (1), it follows that such limits ought to be wholly disregarded in ascertaining whether land is delineated or not. But although the lines shewing limits of deviation may not be a delineating of the land, the laying down on the deposited plan of a centre line and limits of deviation shews that Parliament considered land within such limits to be comprehended within the words "delineated" and "described," and that the words "delineated" and "described" should not, at least as regards the line itself, be construed as meaning only lands which are on the whole of each side bounded by a line. I hold that for the construction of the railway itself land within the limits of deviation, but not so bounded, may be taken. This disposes of the Plaintiffs' case

(1) 6 M. & W. 320.

as to all the parcels, except the few small parcels above mentioned. I now proceed to consider the Plaintiffs' case as to those small parcels.

As regards one of those parcels which was specified in the first notice to treat, and is therein numbered 35, the Plaintiffs say it extends beyond the limits of deviation. Part of No. 35 on the deposited plan is within the limits of deviation; that part is included within what I have above decided against the Plaintiffs. Another part is outside such limits, and the Plaintiffs, failing in their contention that no part of No. 35 is authorized to be taken, now say that, although so much thereof as is within the limits of deviation be held to be authorized to be taken, such decision leaves open to them the contention, and they accordingly do contend, that there is no other land shewn by the company to be included in No. 35; or if there be, that a small parcel of land, which the company have taken as being part of No. 35, is not shewn by the company to be within sect. 23 of the Act.

The land No. 35 is, according to the deposited plan, land which is inclosed on all sides except on parts of two sides. The plan above referred to (see Dep. Plan I.) shews to what extent there is on the deposited plan a want of complete inclosure by lines of No. 35. The absence of such complete inclosure is similar in character to that already referred to as regards Nos. 6, 9, and 10, and the piece of land No. 35, coloured in the notice plan, as to which the question now being considered arises, may be conveniently described as being the angular piece of land part of No. 35.

The contents of the whole of No. 35, and the length not inclosed by lines, are as follows:—

The whole area of No. 35, treating it as comprising the angular piece of land, is 7A. 1R. 1P. The angular piece contains 1R. 11P., this being about $\frac{1}{28}$th part of the whole quantity of 7A. 1R. 1P. The length of so much of the angular piece as is on the right hand side, and is not shewn on the deposited plan to be bounded by the road, is about 2 chains (or 44 yards), and the length of so much of the angular piece as is on the bottom side, and is not shewn on the deposited plan to have a boundary fence, is 4 chains and 60 links (or about 100 yards).

In considering this contention on the part of the Plaintiffs,

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

regard must be had to the way in which the deposited plan is drawn as regards the lines bounding wholly or partially different parcels of land, not merely as regards the parcel No. 35, but other parcels, including some which I have specifically above referred to (Nos. 6, 9, and 10); and I assume that I have rightly decided as to the parcels of land within the limits of deviation but not wholly surrounded by lines, and it must be borne in mind what the object of depositing the plans and of the books of reference is, such object being to give notice to the public, and landowners in particular, where the promoters of the company propose to acquire power to construct the railway and works. If the Plaintiffs, who had notice of the bill in Parliament, and, as the evidence shews, personally or by their agents examined the bill and plans, and opposed the bill, and obtained the insertion of clauses in the Act for their protection, had not notice by the plans and books of reference that the small piece of land in question might be taken, they had not the opportunity of objecting to the creation of compulsory powers in reference thereto. I cannot bring myself to believe that the Plaintiffs had not such notice. I do not think it necessary to determine which, if any, of the views which the witnesses have put forward as to the mode of completing the inclosure of land numbered but not wholly surrounded by lines is the correct one. I think no hard and fast rule can be laid down, and that each case must depend on its own circumstances. I say enter upon the land, with the map and book of reference in hand; observe the line of railway as laid down, the limits of deviation, the several numbers on the map, the fences and other boundaries, and ask yourself the question whether the piece of land in question is delineated and described: my answer to the question is, in the present case, in the affirmative. I consider that "delineated" cannot in this Act be interpreted as meaning surrounded in every part by lines. I think it is manifest that a broader interpretation of it must be adopted in order to give effect to the Act. If it be necessary to say what it does mean, I say I think it means sketched or represented, or so shewn that landowners would have notice that the land might be taken. Such, I think, is substantially the view taken by several competent persons who have given evidence in this case; although it is not upon their, but upon my own, in-

terpretation that I rest my decision. It was contended before me that the case of *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1) governs this case, but it does not appear to me that this is so. It appears from the report in the *Jurist* that all the boundaries of the inclosure No. 71 within the limits of deviation were duly marked, but the other land was undefined. There was, therefore, a complete close to which the No. 71 might be referred, and no number applied to the remainder, which was undefined. The actual facts of the case are not very fully stated, and the two reports do not agree in the judgment. As to this piece of land, No. 35, having regard to the purpose for which it was taken, viz., to form part of an altered road by means of which access to the Plaintiffs' lodge has been afforded (as to which I refer to observations I am about to make upon another objection of the Plaintiffs to the company taking this piece of land), and to its very small marketable value, which I am satisfied does not exceed £3, and to it not having, as I think, any special value to the Plaintiffs, I should not, had I taken a different view to that I have above expressed, have given the Plaintiffs relief in this suit—unless the objection I now proceed to consider had appeared to me to entitle the Plaintiffs to be relieved.

The objection is this: the Plaintiffs say it, or the greater part of this part of No. 35, is unnecessary, or not required for the purpose for which the company are empowered to take land. The company have taken this land to form an embankment, being a diversion of the turnpike road from which one of the Plaintiffs' lodges was entered. If this road had not been diverted, one of two things must have happened: the turnpike road must have been lowered or raised, so that it would, at the Plaintiff's lodge, have been several feet below or above the lodge. To prevent this entrance being destroyed, the company diverted the road, considering themselves entitled to do so under the 16th section of the *Railways Clauses Consolidation Act*. The Plaintiffs, however, say they prefer to be shut out altogether from the road, and that the diversion of the road has not left them a convenient entrance by this lodge. The Plaintiffs rely, in support of their contention, on the case of *Reg.* v. *Wycombe Railway Company* (2), as a decision

(1) 1 Giff. 352; 9 Jur. (N.S.) 710. (2) Law Rep. 2 Q. B. 310.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

that sect. 16 of that Act (8 Vict. c. 20) only authorizes a diversion of a road where necessary for the construction of the railway. But in that case Lord Chief Justice *Cockburn* said (1): "But we are not to look at the convenience of the company alone, but to the accommodation and convenience of those who have rights of property which are interfered with, of those who have immediate access to the road, or persons using it of necessity in the ordinary course of their business." And the observations of the learned Judges in that case must be read in reference to the case before them, in which the railway company was about to interfere most materially with the user before enjoyed by a person of the old road. In the case of *Rangeley* v. *Midland Railway Company* (2), the company required to take land for the purpose of diverting a public footpath, and the Lords Justices *Cairns* and *Selwyn* held that this could lawfully be done. That case was recognised in *Lord Beauchamp* v. *Great Western Railway Company* (3), in which the case of *Reg.* v. *Wycombe Railway Company* was cited, and in which it was laid down that diversion was lawful as well in the case of the diversion of a private as of a public right of way. In that case Lord Justice *Selwyn* said: "*Rangeley* v. *Midland Railway Company* establishes that land may be taken for the purpose of placing on it a substituted highway for the accommodation of the public. But there remains the question, whether the same reasons apply to the accommodation required for private purposes. The question, then, is whether the Acts of Parliament make any such distinction between public and private accommodation. I think not, for the 16th section of the *Railways Clauses Act* appears to class all accommodation works together, as standing on the same footing. The only remaining question, then, is the question of fact, whether the work which is here proposed, and which is actually made, is an accommodation work connected with the railway? A glance at the plan and the bill itself, I think, shews that this is an accommodation work of a proper and reasonable character immediately connected with the railway." In that case the company was compellable to find the accommodation for the private individual; but this does not, I think, prevent the case being an

(1) Law Rep. 2 Q. B. 320. (2) Law Rep. 3 Ch. 306.
(3) Law Rep. 3 Ch. 745, 751, 752.

authority in favour of the company in the present case. I also refer to the observations and the decision of Lord *Hatherley* in the case of *Attorney-General* v. *Ely, &c., Railway Company* (1). Having regard to these authorities, I am of opinion that the objection which I have just been considering cannot be sustained.

The Plaintiffs say that the accommodation for them by the diversion of the road is insufficient and inconvenient. I am not much impressed with this objection, and at all events I think that the Plaintiffs may well be left to derive from it such advantage as they may be able in the amount of compensation which they may obtain from the company.

If I had not thus overruled this objection I should have considered that the Plaintiffs were not entitled to avail themselves of it, having regard to the knowledge they had of the intended construction of the embankment, as appears in the affidavit of Mr. *Ward* filed on the 18th of June, 1872, and the report I shall hereafter mention. In one of the letters set out on that affidavit, being a letter dated the 10th of November, 1870, from Mr. *Ward* to Mrs. *Dowling*, the writer, who had previously left with Mrs. *Dowling* a plan shewing the diversion, stated: "The deviation in the turnpike road is made, or to be made, to suit your road and not the public." This was in reply to a letter of Mrs. *Dowling*, in which she said, "The road was no accommodation to her, but the reverse;" but though the Plaintiffs strongly objected to the company taking any of their lands, they do not seem to have specifically objected to the diversion of the road. In the cross-examination of Mr. *Dowling*, referring to the proceedings in Parliament, he says: "The question of the injury to the lodge was considered, and the injury was to be prevented." It was with this view that the company took the piece of land in question, and constructed the embankment, and diverted the road. It is further to be observed, that part of this piece would, under any circumstances, have been required for the raising or erecting of the road, unless, indeed, perpendicular retaining walls had been built, on plans which I do not think it was incumbent on the company to adopt, not forgetting the case of *Coats* v. *Clarence Railway Company* (2), and other cases of the same kind.

(1) Law Rep. 4 Ch. 194.

(2) 1 Russ. & My. 181.

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

It is to be observed that the Plaintiffs, in reference to the preservation of the entrance to their lodge, which could only be preserved by taking the piece of land in question, in paragraph 12 of their bill state that the company intend, unless restrained, to effect the crossing of the road in an unauthorized manner, and that notwithstanding this the Plaintiffs now insist that the company should have so constructed their works as to block up the entrance to the lodge. In considering the other objections to the company taking this piece of land, part of No. 35, I have already mentioned the value of it.

I now proceed to consider the Plaintiffs' case as to pieces of land mentioned in the first notice to treat, Nos. 65 and 68. The Plaintiffs say that these are not necessary or required for any of those purposes for which the company are empowered to take lands, having regard to the 2nd sub-section of section 32 of the Act. The Plaintiffs' contention is that those parcels of land are westward of the line of railway shewn on the deposited plans. A great deal of evidence has been entered into in reference to these parcels of land being or not being westward of the centre line referred to. It would at first sight appear that this was a very simple question of fact, capable of being disposed of by a measurement which could be made in a few minutes, and as to which there could be no dispute; but the difficulty which has arisen has been occasioned by the difficulty of ascertaining where the centre line of railway is, there being no fixed point specified in the Act from which a measurement is to be made to fix that centre. It appears to me that Parliament not having clearly defined the centre line, the company should be held to have acted within their powers if they have taken their admeasurement from a point which should be considered as reasonably and *bonâ fide* adopted by them, and I am of opinion that the evidence shews that they have so acted. Had I thought otherwise, I should have had to consider and determine whether the *onus probandi* that the company was exceeding its powers was not on the Plaintiffs, considering that the 32nd section is a clause restrictive of the general power given to the company, and is an enactment for the benefit of the Plaintiffs, of which the Plaintiffs are, by their contention, in effect seeking specific performance. If the *onus probandi* would be on the Plaintiffs, as I view the evi-

dence, their case would not be made out to my satisfaction. I certainly should not, had I not taken the view I have done, have given the Plaintiffs a decree founded on this objection, without first obtaining the assistance of a competent person to fix the centre line of railway and to make an admeasurement therefrom.

There remains one other piece of land which the Plaintiffs object to the company having taken. The objection is this, that although the company were entitled to take it, the notice to treat did not include it. This piece of land is a piece of about eight perches; it is on the deposited plan No. 38; it is situated at a corner of No. 37; and, looking at the plan, had it not had a separate number, would well have been included under No. 37.

The notice to treat is set out in paragraph 7 of the bill. It describes the lands required to be taken, thus: "The lands, of which the particulars are contained in the schedule hereto, with the appurtenances, and which said lands so required are, for the better description thereof, delineated on the plan attached hereto or delivered therewith, and are thereon distinguished by a red colour." In the schedule No 38 is omitted, but the land so numbered is part of the land coloured red on the plan. This the Plaintiff Mr. *Dowling*, after much fencing with the question put to him, was obliged to and did admit. It is also to be observed that in a plan annexed to the notice the pieces of land to be taken are mentioned as containing 9A. 3R. 16P., and that No. 38 is required to make up that quantity. It seems to me that, taking the notice and schedule and plan together, particularly having regard to the position of No. 38 in connection with No. 37, that a notice to take No. 38 was given. I think that it was, in fact, valued by the valuers, and that there was paid into Court the price thereof as well as of the other lands. It is to be observed that the value of this piece of land was not more than 50*s*. I think, although this is unimportant having regard to the opinion I have above expressed, that Mr. *Dowling* and his solicitor were well aware that there was what they considered a defect in the notice in not inserting in the schedule No. 38, but never called attention to it.

Mr. *Hemming*, in the course of his very able argument, dwelt much upon the rule that private rights are to be protected as against railway companies exceeding their powers, although the

V.-C. H. 1874

DOWLING v. PONTYPOOL, CAERLEON, AND NEWPORT RAILWAY CO.

public may be thereby inconvenienced. Referring to *Raphael* v. *Thames Valley Railway Company* (1), to which many other cases might be added, I may mention *Stretton* v. *Great Western and Brentford Railway Company* (2) and *Attorney-General* v. *Mid-Kent Railway Company* (3) and other cases. The view that I have taken of the Plaintiffs' case is in no way opposed to the rule so referred to by Mr. *Hemming*.

Mr. *Hemming* urged that unless I gave the Plaintiffs a decree I should be departing from the rule laid down in *Webb* v. *Manchester and Leeds Railway Company* (4), in which Lord *Cottenham* said: "And if there be any reasonable doubt as to the extent of their powers they must go elsewhere and get enlarged powers; but they will get none from me by way of construction of their Act of Parliament." I may refer to *Lamb* v. *North London Railway Company* (5), in which Lord Justice *Selwyn* said, referring to *Webb* v. *Manchester and Leeds Railway Company*, that the burden lay on the company to shew that they are acting within their powers. There have been many other cases in which the same rule is recognised. I have not intended to depart, and I consider I have not departed, from that rule. I may, however, refer to what Lord *Cottenham* said in other cases. In the *River Dun Navigation Company* v. *North Midland Railway Company* (6), which preceded *Webb* v. *Manchester and Leeds Railway Company*, he said, the case must be one "in which the Court is very clearly of opinion that the company are exceeding the powers which the Act has given them." And in *Bell* v. *Hull and Selby Railway Company* (7), which was decided after *Webb* v. *Manchester and Leeds Railway Company*, he said: "It is very necessary that this Court should deal very strictly with these companies, and prevent them, with the large powers that are given to them by Acts of Parliament, from defeating the rights and interests of individuals. But it is also the duty of the Court to take care that if individuals avail themselves of any omission of any power on the part of the company, this Court should not assist those individuals in extorting

(1) Law Rep. 2 Ch. 147.
(2) Ibid. 5 Ch. 751.
(3) Ibid. 3 Ch. 100.
(4) 4 My. & Cr. 116.
(5) Law Rep. 4 Ch. 522.
(6) 1 Railw. Cas. 135, 154.
(7) 1 Railw. Cas. 616, 636.

money from the company. It is the duty of the Court in every case to steer clear of those two opposite extremes; and if there should be some omission, which may give a party a legal right against a company, the Court would leave that individual to his legal means of taking advantage of it." *Swaine* v. *Great Northern Railway Company* (1) may also be mentioned. I may also observe that the jurisdiction which the Court now has to give damages in lieu of an injunction might perhaps (I do not say that it would) have been properly exercised in a case like the present, had I been in favour of the Plaintiffs, as to some one or more, or even all of the several pieces of land which they allege the company have improperly taken. I may here refer as bearing on this to *Wood* v. *Charing Cross Railway Company* (2), and to some observations of Lord *Hatherley* in *Stretton* v. *Great Western and Brentford Railway Company* (3); and in reference to this it must be borne in mind that the value of all the land of the Plaintiffs' outside the limits of deviation taken by the railway company—of which land the lands in question are only parts—is but small. No. 38 is within the limits of deviation. In the answer of the Defendants, which is under the oath of the secretary, all this land is estimated as worth £25. The Plaintiffs' bill must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Phillips & Son.*
Solicitors for the Defendants: Messrs. *Burchells.*

(1) 9 Jur. (N.S.) 1196; 10 Jur. (N.S.) 191.
(2) 33 Beav. 290.
(3) Law Rep. 5 Ch. 761.

END OF VOL. XVIII.

INDEX.

ABANDONMENT—Railway company—Notice to treat—Costs - - - 338
See COSTS UNDER LANDS CLAUSES ACT. 1.

ABATEMENT—Annuity—Charge on corpus 411
See ANNUITY CHARGED ON CORPUS. 1.

ABSOLUTE GIFT—Followed by gift of money remaining after legatee's death - 152
See REPUGNANT GIFT.

ACCOMMODATION WORKS—Railway company
See COMPULSORY POWERS. [714

ACCOUNT—Bankers'—Balance Set-off - 198
See BANKERS' ACCOUNT.

—— Bill for—Delay—Trustees - - 356
See TRUSTEE'S ACCOUNTS.

—— Disputed—Interest on - - - 154
See INTEREST ON UNCERTAIN SUM.

ACQUIESCENCE—Infringement of copyright 444
See COPYRIGHT IN BOOK. 1.

ADEMPTION — *Satisfaction — Double Portions—Evidence of Intention — Rebuttal — Costs.*] A legacy may be adeemed by a gift, although not made on marriage or any other special occasion with reference to the donee.—By marriage settlement an estate was limited to trustees for a term of years to raise a sum of £12,000 for the portions of younger children of the settlor as he should appoint. Two of the younger children, on their marriages, being paid certain sums, released their shares. The settlor, by his will, in 1866, devised the estate to trustees for a lesser term of years, and, subject thereto, to his eldest son in strict settlement, the trusts of the term being to raise and pay, within three months of his death, to two other younger children, the Plaintiffs *C.* and *M.*, the sums of £4000 and £6000, the same to be accepted by them in full satisfaction and discharge of their shares of the £12,000. The testator also gave *C.* and *M.* annuities for life, or until marriage, charged upon the same estates, and other annuities charged upon another estate, which he devised to his younger son in satisfaction and discharge of his share of the sum mentioned in the settlement. Between the dates of his will and his death, and also before the date of the will, the settlor gave to *C.* and *M.* sums of money and transferred to them certain stocks:— *Held*, that the legacies were adeemed *pro tanto* by the gifts of stock made after the date of the will.—Consideration of the evidence necessary to rebut the presumption of

ADEMPTION—*continued.*
ademption.—Costs of Plaintiffs (though unsuccessful) given out of the estate. LEIGHTON *v.* LEIGHTON - - - - - 458

ADMINISTRATION—Devastavit — Partial recovery of assets—Hotchpot - - 313
See HOTCHPOT CLAUSE.

—— Interest on legacies - - - 301
See INTEREST ON LEGACIES.

ADVERSE POSSESSION - - 290, 320
See LIMITATIONS, STATUTE OF. 2, 3.

AFFIDAVIT—Bill of review—Recent discovery of facts - - - - - 573
See BILL OF REVIEW.

—— Cross-examination—Non-production of witness - - - - - 524
See NON-PRODUCTION OF WITNESS.

AFTER-ACQUIRED REAL ESTATE - 320
See LIMITATIONS, STATUTE OF. 3.

AGENT—Stockbroker—Insolvency of principal
See CUSTOM OF STOCK EXCHANGE. [182

—— Purchase by, for his own benefit - 524
See AGENT PURCHASING FOR HIMSELF.

—— Set-off—Rents—Conversion - - 198
See SET-OFF OF DEBT OF AGENT.

AGENT PURCHASING FOR HIMSELF—*Agent for Sale—Disclosure of Material Facts—Burden of Proof.*] An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest, or to make statements such as would put the principal on inquiry.—In such a case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the Plaintiff and not corroborated. DUNNE *v.* ENGLISH 524

AGREEMENT — Copyright — Publisher—Second edition—Married woman - - 497
See COPYRIGHT IN BOOK. 2.

ALLOTMENT—Rescission of—Shares - 507
See RESCISSION OF ALLOTMENT.

ANCIENT LIGHTS—Alteration of easement 544
See LIGHT AND AIR.

ANNUITY—Deed of separation—Gift by will 595
See ELECTION.

—— Out of *corpus* - - - 411, 419
See ANNUITY CHARGED ON CORPUS. 1, 2.

ANNUITY CHARGED ON CORPUS — *Deficiency of Income contemplated — Abatement directed.* Where an annuity is, by will, expressly charged on the *corpus* of an estate, subsequent words tending to shew that the testator contemplated that it should abate in the event of the income of the property being insufficient:—*Held*, not to deprive the annuitant of the right to have the *corpus* applied towards making good any deficiency of income to meet the annuity. PEARSON *v.* HELLIWELL - - - - - - 411

2. —— *Will—Deficiency out of Corpus—Income from all Sources—Express Exclusion from Computation.*] *A.* gave by will an annuity of £1000 to his widow, and directed that in case of his estate being insufficient to make up her income from all sources to that amount, a sufficient part of the *corpus* to make up the deficiency should from time to time be sold.—*B.* subsequently by will gave her an annuity of £200, and directed that it should not be taken into account in regard to any other income, it being his express will and desire that it should be a clear beneficial addition to her income:—*Held*, that the widow was not bound to include the £200 annuity in her computation of income, and was entitled to have a sufficient amount of the *corpus* sold to make up her income, independently of that annuity, to £1000. *In re* HEDGES' TRUST ESTATE - - - - 419

ANNULLING ADJUDICATION—*Adjudication of Bankruptcy—Power to annul—Liquidation Petition filed after Bankruptcy Petition—Adjudication made before Liquidation resolved on—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 28, 80, *sub-s.* 10, 84, 125—*Bankruptcy Rules*, 1870, *rr.* 266, 271, 272, 275, 295.] The Court has a general jurisdiction to annul an adjudication of bankruptcy in a proper case.—A debtor filed a liquidation petition, and his creditors resolved on a liquidation by arrangement, but before they did so an adjudication of bankruptcy had been made against the debtor on a petition presented before the filing of the liquidation petition:—*Held*, that the Court could annul the adjudication, either under Rule 266 or under its general jurisdiction. *Ex parte* ASHWORTH. *In re* HOARE - - - 705

APPEAL—Reversal of judgment—Repayment of money—Interest - - - 659
See REVERSAL OF JUDGMENT.

APPOINTMENT—Period of vesting - 587
See VESTING OF APPOINTED SHARE.

APPORTIONMENT OF DIVIDENDS—*Apportionment Act*, 1870—*Bequest for Life of Dividends in a Company.*] Bequest of stock in a canal company to trustees to pay the dividends to the testator's wife for life, and afterwards to fall into the residue:—*Held*, that the dividends were apportionable.—*Whitehead* v. *Whitehead* (Law Rep. 16 Eq. 528) explained. POLLOCK *v.* POLLOCK - 329

APPORTIONMENT — TENANT FOR LIFE AND REMAINDERMAN—*Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35)—*Instrument coming into operation before the passing of the Act—Life Interest in Fund representing Real Estate.*] The *Apportionment Act*, 1870, applies to all instruments, whether coming into operation before or not till after the passing of the Act.—Dividends on a fund in Court representing real estate of a testator who died in 1827, *held* apportionable as between successive tenants for life. *In re* CLINE'S ESTATE - - - - - - 213

APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—*continued.*

ARBITRATION—Submission by counsel - 539
See SUBMISSION TO ARBITRATION.

ARRANGEMENT — Attempt at — Winding-up— Costs - - - - - 656
See LIQUIDATOR.

ATTORNMENT—Tenants in common—Distress
See DISTRESS ON JOINT PROPERTY. [381

AUCTIONEER—Signature of - - 1
See FRAUDS, STATUTE OF. 1.

AUTHOR — Married woman — Agreement with publisher - - - - 497
See COPYRIGHT IN BOOK. 2.

BANKERS' ACCOUNT—*Will—Balance at Bankers—Set-off.*] A testator having directed his debts and legacies (other than charitable legacies) to be paid out of impure personalty, and his charitable legacies out of pure personalty, the following points were decided:—The testator borrowed £6500 from his bankers, to be repaid on a specified day. He died before the day of payment, and at his death a sum of £629 was standing to his credit, on his current drawing account:—*Held*, that the £629 must be treated as a set-off against the sum due on the loan account, and was not to be dealt with as an asset in the hands of the executors. THOMAS *v.* HOWELL [198

BANKRUPTCY—Annulling adjudication - 705
See ANNULLING ADJUDICATION.

—— Creditor holding security - - 249
See CREDITOR HOLDING SECURITY.

—— Injunction - - - - 256
See INJUNCTION IN BANKRUPTCY.

—— Meeting of creditors—Notice - - 704
See MEETING OF CREDITORS. 1.

—— Meeting of creditors—Voting—*Ultrà vires* resolution - - - - 705
See MEETING OF CREDITORS. 2.

—— Petitioning creditor—Payment of debt before adjudication - - - 375
See PETITIONING CREDITOR.

—— Withdrawal of proof - - - 373
See WITHDRAWAL OF PROOF.

BARRISTER—Suit against his Inn - 127
See INN OF COURT.

BEQUEST—Charitable—Mortmain 88, 198
See MORTMAIN. 1, 2.

BILL OF EXCHANGE—Equitable assignment
See GARNISHEE ORDER. [283

—— Production of, at meeting of creditors 705
See MEETING OF CREDITORS. 2.

BILL OF REVIEW—*Practice—Infant Petitioner—Affidavit of recent Discovery of Facts.*] An infant petitioning for leave to file a bill of review will not be required to give evidence that the knowledge of the facts relied upon could not have been previously obtained by reasonable diligence:—*Quære*, whether an infant requires the leave of the Court to file such a bill. *In re* HOGHTON. HOGHTON *v.* FIDDEY - - 573

BILL QUIA TIMET — *Injunction — Threatened Violation of Legal Right — Right of Shooting over Estate—Sale of Estate for Building Purposes.*] In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the Plaintiff must shew that the act must result in a violation of such right.—The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars shewed that it was intended to make a road through the estate and dedicate it to the public; but gave full notice of the right of shooting:—*Held*, that the Court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale. PATTISSON *v.* GILFORD - - - - - - 259

BOND—Restraint of trade—Consideration 518
See RESTRAINT OF TRADE.

BROKER — Default of — Custom of Stock Exchange - - - - - 182
See CUSTOM OF STOCK EXCHANGE.

BUILDING—Sale for building purposes - 259
See BILL QUIA TIMET.

CALLS—Crediting shares with future calls 670
See PAYMENT FOR SHARES BY MONEY'S WORTH.

CASES—*Amis* v. *Witt* (33 Beav. 619) followed
See DONATIO MORTIS CAUSÂ. [474

—— *Atkinson* v. *Mackreth* (Law Rep. 2 Eq. 570) considered - - - - - 621
See FIRM OF SOLICITORS.

—— *Attorney-General* v. *Lloyd* (1 Ves. Sen. 32) not followed - - - - 198
See MORTMAIN. 2.

—— *Barnes* v. *Wood* (Law Rep. 8 Eq. 424) observed upon - - - - - 683
See SPECIFIC PERFORMANCE WITH COMPENSATION.

—— *Board* v. *Board* (Law Rep. 9 Q. B. 48) distinguished - - - - - 320
See LIMITATIONS, STATUTE OF. 3.

—— *Burn* v. *Carvalho* (4 My. & Cr. 690) considered - - - - - 283
See GARNISHEE ORDER.

—— *Castle* v. *Wilkinson* (Law Rep. 5 Ch. 534) observed upon - - - - 683
See SPECIFIC PERFORMANCE WITH COMPENSATION.

—— *Colquhoun, In re* (1 Sm. & Giff. App.; 5 D. M. & G. 35) observed upon - 680
See JOINT RETAINER OF SOLICITORS.

—— *Cooke* v. *Dealey* (22 Beav. 196) questioned
See CONVERSION. [192

—— *Flanagan* v. *Flanagan* (Cited in 1 B. C. C. 498) followed - - - 192
See CONVERSION.

—— *Frowd's Settlement, In re* (4 N. R. 54) not followed - - - - - 587
See VESTING OF APPOINTED SHARE.

CASES—*continued.*

—— *Grant* v. *Grant* (Law Rep. 5 C. P. 380, 727) disapproved - - - 504
See "NEPHEWS AND NIECES."

—— *Harmer* v. *Harris* (1 Russ. 155) observed upon - - - - - 680
See JOINT RETAINER OF SOLICITORS.

—— *Heath* v. *Bucknall* (Law Rep. 8 Eq. 1) followed - - - - 544
See LIGHT AND AIR.

—— *Jackson* v. *Duke of Newcastle* (3 D. J. & S. 275) not followed - - - 544
See LIGHT AND AIR.

—— *Jermy* v. *Preston* (13 Sim. 356) questioned
See CONVERSION. [192

—— *McIntosh* v. *Great Western Railway Company* (4 Giff. 683) considered - 154
See INTEREST ON UNCERTAIN SUM.

—— *Maddison* v. *Pye* (32 Beav. 658) questioned
See COSTS IN ADMINISTRATION SUIT. [578

—— *Mildmay* v. *Methuen* (3 Drew. 91) considered - - - - - 154
See INTEREST ON UNCERTAIN SUM.

—— *Morgan* v. *Malleson* (Law Rep. 10 Eq. 475) not followed - - - - 11
See VOLUNTARY GIFT.

—— *Osborn* v. *Morgan* (9 Hare, 487) followed
See EQUITY TO A SETTLEMENT. [487

—— *Pawsey* v. *Barnes* (20 L. J. (Ch.) 393) distinguished - - - - - 246
See LIMITATIONS, STATUTE OF. 1.

—— *Pearson* v. *Pearson* (1 Sch. & Lef. 10) distinguished - - - - - 301
See INTEREST ON LEGACIES.

—— *Richardson* v. *Richardson* (Law Rep. 3 Eq. 686) not followed - - - 11
See VOLUNTARY GIFT.

—— *Seixo* v. *Provezende* (Law Rep. 1 Ch. 192) discussed - - - - - 138
See TRADE-MARK.

—— *Shirt* v. *Westby* (16 Ves. 393) distinguished
See INTEREST ON LEGACIES. [301

—— *Spurway* v. *Glynn* (9 Ves. 483) distinguished - - - - - 301
See INTEREST ON LEGACIES.

—— *Staight* v. *Burns* (Law Rep. 5 Ch. 163) followed - - - - - 544
See LIGHT AND AIR.

—— *Vizard's Trusts* (Law Rep. 1 Ch. 588) followed - - - - - 587
See VESTING OF APPOINTED SHARE.

—— *Whitehead* v. *Whitehead* (Law Rep. 16 Eq. 528) explained - - - 329
See APPORTIONMENT OF DIVIDENDS.

—— *Wilson* v. *Lloyd* (Law Rep. 16 Eq. 60) distinguished - - - - - 249
See CREDITOR HOLDING SECURITY.

—— *Yates* v. *Jack* (Law Rep. 1 Ch. 295) followed - - - - - 544
See LIGHT AND AIR.

CASES AND OPINIONS OF COUNSEL - 649
See PRODUCTION OF DOCUMENTS.

"CASH UNDER CONTROL OF THE COURT" [280
See INVESTMENT SANCTIONED BY THE COURT.

CERTIFICATE — Engineer — Interest on sums payable - - - - 154
See Interest on uncertain Sum.

CHARITY—Honorary trust—Gift of surplus 114
See Honorary Trust.

—— Money paid into Court under Lands Clauses Act—Payment out of Court 279, 658
See Payment out of Court. 1, 2

—— Mortmain - - - 88, 198
See Mortmain. 1, 2.

CHILD EN VENTRE SA MÈRE—*Devise—Estate Tail—Intermediate Rents.*] Devise to trustees to the use of the first and other sons of *M.* in tail male, with a residuary devise. Three months after the testator's death the first son of *M.* was born:—*Held*, that the residuary devisees were entitled to the intermediate rents from the testator's death to the birth of the tenant in tail. *In re* Mowlem - - - - - 9

CIRCULAR—Threatening legal proceedings 330
See Threatening Legal Proceedings.

CLOSING ACCOUNT—Stock Exchange - 182
See Custom of Stock Exchange.

COLLATERAL SECURITY — Composition with creditors - - - - 249
See Creditor holding Security.

COMMITTAL—Contempt of Court—Bankruptcy Act, 1869 - - - - 701
See Contempt of Court.

COMPANY—Compulsory powers—Notice—Delineation on plans - - - 714
See Compulsory Powers.

—— Contract for paid-up shares - - 95
See Contract for paid-up Shares. 1—4.

—— Liquidator—Costs - - - 656
See Liquidator.

—— Misrepresentation by promoters of company - - - - - 661
See Misrepresentation by Promoters.

—— Paid-up shares — Contract for—Companies Act, 1867 - - 16, 17, n., 95, 542
See Contract for paid-up Shares. 1—4.

—— Paid-up shares—Payment by money's worth [670
See Payment for Shares by Money's Worth.

—— Qualification of director - - 428
See Qualification of Director.

—— Rescission of allotment of shares - 507
See Rescission of Allotment.

—— Scheme of arrangement - - 556
See Scheme of Arrangement.

—— Unregistered—Misrepresentation by promoters - - - - 661
See Misrepresentation by Promoters.

COMPENSATION UNDER LANDS CLAUSES ACT —Charity—Payment out of Court 279,
See Payment out of Court. 1, 2. [658

—— - - - - - - 539
See Submission to Arbitration.

COMPOSITION WITH CREDITORS — Creditor holding security - - - 249
See Creditor holding Security.

COMPOSITION WITH CREDITORS—*continued.*
—— Withdrawal of proof - - - 373
See Withdrawal of Proof.

COMPULSORY POWERS—*Railway Company—Lands—Construction of word "delineated"—Land not inclosed on every side by Lines—Notice—Accommodation Works—Railways Clauses Acts* (8 *Vict. c.* 20), *s.* 16—*Small Excess of Powers.*] A railway Act empowered the company to take lands delineated on the deposited plans and described in the book of reference:—*Held*, that where the boundary of a plot was left unclosed outside the limits of deviation, the company might at any rate take up to the limits of deviation:—*Held*, also, that the word "delineated" could not be limited to mean surrounded on every side by lines, but that it meant sketched, or represented, or so shewn that landowners would have notice that the land might be taken.—Evidence (not before the Committee of Parliament) was admitted to prove boundaries beyond those shewn on the deposited plans, and was used in determining the extent of the "lands delineated."—Evidence of engineers, as experts, on the construction of the plans and of the Act was not admitted.—The company, in order to avoid the necessity of completely blocking up the Plaintiffs' entrance, took land of theirs to divert a road so as to diminish the obstruction:—*Held*, that such land was necessary for the purposes of the Act, though the Plaintiffs did not desire the diversion of the road, and objected to their land being taken for the purpose.—The deposited plans and book of reference shewed a small plot, No. 38, nearly surrounded by a large plot, No. 37. The schedule to the notice to treat mentioned 37 but not 38, and the accompanying plan omitted both the number and the boundary of 38. The painted area on the notice plan in fact covered the site of No. 38, and this fact was known to the Plaintiffs long before they pointed out the objection:—*Held*, that the notice was sufficient under the circumstances to entitle the company to take 38.—Where a railway company was bound by its Act to make a good and sufficient siding on a specified field of an owner who had opposed the bill:—*Held*, that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field.—Where a railway company takes land in excess of its powers, *semble*, the Court will not grant relief by injunction if the quantity and value of the land are extremely small. Dowling *v.* Pontypool, Caerleon, and Newport Railway Company - - - - - - 714

COMPUTATION OF INCOME—Exclusion from—Annuity - - - - 419
See Annuity charged on Corpus. 2.

CONDITION—Forfeiture—Ignorance of condition—Statute of Limitations - - 290
See Limitations, Statute of. 2.

—— Restraint of marriage - - - 510
See Restraint of Marriage.

—— Restraint of trade - - - 518
See Restraint of Trade.

CONDITIONS OF SALE—Acceptance of offer subject to conditions of sale - - 180
See CONDITIONAL ACCEPTANCE.

CONDITIONAL ACCEPTANCE—*Vendor and Purchaser—Specific Performance—Conditions of Sale.*] Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows: "Which offer we accept, and now hand you two copies of conditions of sale," and therewith inclosed a formal agreement with conditions of a special character: —*Held*, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers. CROSSLEY *v.* MAYCOCK - 180

CONSIDERATION — *Contract for restraint of trade* - - - - - 518
See RESTRAINT OF TRADE.

CONTEMPT OF COURT—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 19—*Failure of Debtor to deliver up Property to Trustee after Discharge—Committal—Jurisdiction.*] On the 8th of October the creditors of two debtors, who were partners in trade, resolved on a liquidation, and appointed trustees, and on the 5th of November they granted the debtors their discharge in respect of their partnership liabilities. The trustees employed the debtors as their servants, at a weekly salary, to realize the estate. After the order of discharge was granted one of the debtors received moneys on account of the partnership estate, and applied them in paying his separate creditors. An order was made by the County Court that he should refund the moneys thus misapplied, and he failed to obey the order:—*Held*, that there was jurisdiction under sect. 19 of the *Bankruptcy Act*, 1869, to commit him for contempt of Court. *Ex parte* WATERS. *In re* WATERS - - - 701

CONTRACT—Cancellation of - - 670
See PAYMENT FOR SHARES BY MONEY'S WORTH.

—— Conditional acceptance of offer - 180
See CONDITIONAL ACCEPTANCE.

—— Foreign subject-matter and parties - 340
See FOREIGN CONTRACT.

—— Paid-up shares—Companies Act, 1867, *s.* 25 [16, 17, n., 25, 542
See CONTRACT FOR PAID-UP SHARES. 1—4.

—— Restraint of trade—Consideration - 518
See RESTRAINT OF TRADE.

CONTRACT FOR PAID-UP SHARES—*Company—Non-registration of Contract—Mistake—Rectification of Register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 25—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] Where fully paid-up shares had been issued in pursuance of a contract which had not been registered in accordance with sect. 25 of the *Companies Act*, 1867, on an application under sect. 25 of the *Companies Act*, 1862, to which the company consented, the Court made an order to rectify the register by striking out the names of the holders, and that shares should be re-issued after the registration of the contract, it appearing that the holders had accepted the shares in ignorance of the omission to register the contract. *In re* DENTON COLLIERY COMPANY. *Ex parte* SHAW - - - - 16

CONTRACT FOR PAID-UP SHARES—*continued.*

2. —— *Non-registration of Contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131) *s.* 25—*Rectification of Register*—(25 & 26 *Vict. c.* 89) *s.* 35.] Fully paid-up shares were issued by directors in pursuance of a contract with the allottees, but the directors omitted to register them in conformity with the 25th section of the Companies Act, 1867. The Court, on being satisfied that the allottees were ignorant of the omission to register the contract, ordered the register to be rectified, and fresh shares to be issued. *In re* NEW ZEALAND KAPANGA GOLD MINING COMPANY. *Ex parte* THOMAS - - - - - 17, n.

3. —— *County Court Appeal—Companies Act*, 1867 (30 & 31 *Vict. c.* 131) *s.* 25—*Contract in Writing by Articles of Association—Registration.*] The owners of a mine worked on the cost-book principle formed a limited company by registration under the Companies Acts, 1862 and 1867, and signed the memorandum of association for the full number of £10 shares into which the capital was to be divided, in proportion to their respective interests in the mine, and a clause in the articles of association (which were duly signed) stated that it was agreed that the sum of £7 should be credited on each of their £10 shares, and that all their interests should vest in the company:—*Held*, that this was a valid contract sufficiently registered under the 25th section of the Act of 1867. *In re* APPLETREEWICK LEAD MINING COMPANY - - - - 95

4. —— *Company—Non-registration of Contract—Rectification of Register—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] Where shares were allotted and accepted as fully paid up in pursuance of a contract which, through inadvertence, had not been registered in accordance with sect. 25 of the *Companies Act*, 1867, and upon discovery of the omission the directors removed the name of the allottee from the register, then filed the contract, and subsequently issued fresh shares to the allottee, and the company was subsequently wound up:—*Held*, that although the directors had no power to cancel shares, they could rectify a mistake common to them and the allottee without applying to the Court of Chancery for an order directing them to do so; and, consequently, that the allottee could not be placed on the list of contributories in respect of those shares. *In re* POOLE FIREBRICK AND BLUE CLAY COMPANY. HARTLEY'S CASE - - - - 542

CONTRACTOR—Sums payable on engineer's certificate—Interest - - - 154
See INTEREST ON UNCERTAIN SUM.

CONTRIBUTORY—Paid-up shares—Companies Act, 1867, *s.* 25 - 16, 17, n., 95, 542
See CONTRACT FOR PAID-UP SHARES. 1—4.

—— Paid-up shares—Payment by money's worth [670
See PAYMENT FOR SHARES BY MONEY'S WORTH.

—— Qualification of director - - 428
See QUALIFICATION OF DIRECTOR.

—— Rescission of allotment of shares - 507
See RESCISSION OF ALLOTMENT.

CONTRIBUTORY—*continued.*

—— Unregistered company—Misrepresentation [661

See Misrepresentation by Promoters.

CONVERSION—*Real Estate—Infant Tenant in Tail—Sale by Court of Infant's Real Estate—Death of Infant—Devolution of Proceeds of Sale.*] Real estate was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross remainders between them. A suit was instituted by the trustees against the *cestuis que trust* for the administration of the trust, and a decree was made after one of the infants had attained twenty-one, by which (the Court being of opinion that a sale would be for the benefit of the infant Defendant, and the adult Defendant consenting) a sale was ordered. A sale was made under the decree, and the purchase-money paid into Court; and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one:—*Held*, that the fund in Court belonged to his legal personal representative, and was not to be treated as realty.—*Flanagan* v. *Flanagan* (Cited in *Fletcher* v. *Ashburner*, 1 B. C. C. 498) followed.—*Jermy* v. *Preston* (13 Sim. 356) and *Cooke* v. *Dealey* (22 Beav. 196) questioned. Steed *v.* Preece - - - - 192

—— Trust for sale—Statute of Limitations 246

See Limitations, Statute of. 1.

—— Wasting securities—Enjoyment in specie

See Enjoyment in Specie. [422

COPYRIGHT IN BOOK—*Piracy—Copyright Act* (5 & 6 *Vict. c.* 45), *s.* 26—*Limitation of Suits—Conduct of Plaintiff—Acquiescence.*] The 26th section of the *Copyright Act* (5 & 6 Vict. c. 45) does not apply to prevent a suit for an injunction to restrain a piracy of copyright by sale of a book published more than twelve months before bill filed.—Mere delay in taking proceedings after knowledge of a piracy is not in itself such acquiescence as will deprive a Plaintiff of his right to an injunction at the hearing. Hogg *v.* Scott - - - - - 444

2. —— *Married Woman—Agreement with Publisher—Implied Contract—Suit to restrain Publication of Second Edition by Licensee.*] An authoress, who was a married woman, entered into a verbal agreement with a publisher that he should publish a work at his own expense, and pay her a royalty on the copies sold. The work was accordingly published, but, before all the copies were sold, the authoress arranged with another publisher to bring out a second edition of the same work:—*Held*, that no agreement could be implied on the part of the authoress not to bring out another edition until all the first edition was sold, and that a suit against the authoress and her husband and the second publisher to restrain such publication could not be sustained.—*Semble*, a married woman, entitled to the copyright of a work for her separate use, might enter into such a contract with a publisher for its publication as to bind herself during a definite period not to grant a license to publish the work to any other person, and such a contract would be enforceable

COPYRIGHT IN BOOK—*continued.*

against a licensee with notice. Warne *v.* Routledge - - - - - - 97

CORPUS OR INCOME—Charge of annuity 411, [419

See Annuity charged on Corpus. 1, 2.

—— Dividends—Life insurance company 696

See Dividends whether Income or Corpus.

COSTS IN ADMINISTRATION SUIT—*Undisposed of Real Estate—Lapsed Share.*] The rule that in providing for the costs of an administration suit real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of, applies equally to real estate which descends by reason of lapse and to that as to which no disposition has been attempted.—*Maddison* v. *Pye* (32 Beav. 658) questioned. Scott *v.* Cumberland - - - 578

COSTS UNDER LANDS CLAUSES ACT—*Investment on Real Security—Subsequent Investment.*] It is not now the practice to introduce into an order for the investment of money paid into Court under the *Lands Clauses Consolidation Act* upon real security, a direction that the company paying the money into Court are not to be required to pay the costs of a subsequent investment in land. *In re* Sewart's Estate - - - 278

2. ——, *Notice to treat—Abandonment of part of Undertaking—Costs out of Fund.*] A railway company having power to take compulsorily certain portions of an estate, served notices to treat for them. They afterwards abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into Court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions:—*Held*, on a petition by the tenant for life for investment of the fund in Court, that these costs, charges, and expenses might properly be paid out of the fund before investment. *In re* Strathmore Estates - - - - - 338

COVENANT TO SETTLE—*Marriage Settlement—Future Property.*] A widow entitled to a life interest in a fund, and also to a moiety of the capital, subject to her own life interest, married again. By the settlement on the second marriage her life interest was settled, and she and her intended husband covenanted to settle property to which she or he in her right should, during the coverture, become entitled:—*Held*, that the words of futurity were satisfied in respect of the husband's interest, and that the moiety of the fund was subject to the covenant. *In re* Viant's Settlement Trusts - - 436

COST-BOOK COMPANY—Contract for paid-up shares - - - - 95

See Contract for paid-up Shares. 3.

COSTS—Administration suit—Lapsed share of real estate - - - - 578
See COSTS IN ADMINISTRATION SUIT.

—— Joint retainer of solicitor - - 680
See JOINT RETAINER OF SOLICITORS.

—— Lands Clauses Act - - 278, 338
See COSTS UNDER LANDS CLAUSES ACT. 1,2.

—— Power to raise portions - - 541
See PORTIONS.

—— Trustee—Negligence - - - 634
See LIABILITY OF TRUSTEE.

—— Trustee—Negligence in filing accounts 356
See TRUSTEE'S ACCOUNTS.

COUNSEL—Cases and opinions - - 649
See PRODUCTION OF DOCUMENTS.

—— Certificate of—Short cause - - 92
See SHORT CAUSE.

—— Suit by barrister against his Inn - 127
See INN OF COURT.

CREDITOR—Composition—Withdrawal of proof
See WITHDRAWAL OF PROOF. [373

—— Meeting of creditors - - 704, 705
See MEETING OF CREDITORS. 1, 2.

—— Secured—Collateral security - 249
See CREDITOR HOLDING SECURITY.

—— Secured—Production of security—Voting at meeting - - - - 705
See MEETING OF CREDITORS. 2.

CREDITOR HOLDING SECURITY—*Composition—Collateral Security—Right to retain Security—Equitable Mortgage—Order for Sale—Jurisdiction—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] Two partners filed a liquidation petition. Their joint creditors resolved to accept a composition of 10*s.* in the pound in satisfaction of their debts. Among the creditors who voted in favour of the resolution was a banking company, who held security for their debt upon the separate estate of one of the partners. The affidavit by which they proved their debt stated their security, but they voted in respect of their whole debt. The resolutions contained no provision reserving the right of creditors who held collateral securities to retain them, but a provision to that effect was inserted in a deed afterwards executed to carry out the arrangements of the composition. The composition was duly paid to the bank:—*Held* (reversing the decision of the County Court Judge), that the bank were entitled to retain their security.—*Wilson* v. *Lloyd* (Law Rep. 16 Eq. 60) distinguished.—In a case of composition the Court of Bankruptcy has no jurisdiction to make an order for sale at the instance of an equitable mortgagee of the estate of the debtor. *Ex parte* MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY. *In re* LITTLER - 249

CROSS-EXAMINATION—Non-production for 524
See NON-PRODUCTION OF WITNESS.

CUSTOM—County—Timber - - 306
See WASTE.

CUSTOM OF STOCK EXCHANGE—*Principal and Agent—Insolvency of Principal—Default of Broker on Stock Exchange—Closing of Account—Indemnity of Broker—Custom of Stock Exchange.*] By the usage of the *London Stock Exchange* stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business.—In equity an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal.—Messrs. *C.*, brokers on the *London Stock Exchange*, on behalf of Sir *R. H.*, entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to Sir *R. H.* to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and the value thereof at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir *R. H.* promised to pay, and directed them to deal with the stocks as they thought best, and they sold part, and continued part. Sir *R. H.* did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. *C.* were (solely by reason of Sir *R. H.*'s failure to pay them) declared defaulters on the *Stock Exchange*, and ceased to be members of that body, and, in accordance with the rules, all their transactions for Sir *R. H.* were closed, and all the stocks they had continued for Sir *R. H.* were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir *R. H.* was thus largely increased. The stocks afterwards continued to fall in value. Messrs. *C.* afterwards paid 6*s.* 8*d.* in the pound on their *Stock Exchange* debts, and were re-admitted as members of the *Stock Exchange*:—*Held*, that the sale was justifiable, both under the usage of the *Stock Exchange* (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of Sir *R. H.* that he would pay on the 15th:—*Held*, also, that although Messrs. *C.* had not paid their debts in full, they were entitled to prove against Sir *R. H.*'s estate for the increased balance appearing due to them after the sales were effected. LACY *v.* HILL. CROWLEY'S CLAIM 182

CUSTOM OF STOCK EXCHANGE—*continued.*

DEBENTURE—Rights of holder—Scheme of arrangement—Suspense period - 566
See SCHEME OF ARRANGEMENT.

DEBT—Release of—Appointment of debtor as executor - - - - 315
See RELEASE OF DEBT.

DEBTOR—Liquidating—Failure to deliver up property - - - - 701
See CONTEMPT OF COURT.

—— Liquidating—Injunction against - 256
See INJUNCTION IN BANKRUPTCY.

—— Petition for adjudication of bankruptcy—Payment of debt - - - 375
See PETITIONING CREDITOR.

DEBTOR'S SUMMONS—Payment of debt before adjudication - - - 375
See Petitioning Creditor.

DECEPTION—Evidence of—Imitation of trade-mark - - - - 138
See Trade-mark.

DECREE—Foreclosure suit—Lands out of jurisdiction - - - - 118
See Foreclosure Suit.

DEPOSIT NOTE—*Donatio mortis causâ* - 474
See Donatio Mortis Causâ.

DEPOSITED PLANS - - - 714
See Compulsory Powers.

DEVASTAVIT—Partial recovery of assets—Hotchpot - - - - - 313
See Hotchpot Clause.

DEVISE—Before Wills Act - - - 320
See Limitations, Statute of, 3.

—— Charity—Power to devise land - 88
See Mortmain. 1.

DIRECTOR—Qualification of - - 428
See Qualification of Director.

DISCRETION—Governing body of public school
See Dismissal of Schoolmaster. [28

DISMISSAL OF ASSISTANT—Surgeon - 518
See Restraint of Trade.

DISMISSAL OF SCHOOLMASTER—*Public Schools Act*, 1868 (31 & 32 *Vict. c.* 118)—*Governing Body—Power to dismiss Head Master—Demurrer.*] The Plaintiff, who was appointed head master of *Rugby School* in November, 1869, by the old trustees of the school—the existing governing body—and was dismissed by the new governing body, appointed under the *Public Schools Act*, 1868, in December, 1873, filed his bill against the governing body, alleging that his dismissal was due to the influence of certain members of the governing body who, prior to their election, had shewn hostility to the Plaintiff's appointment, and had formed a scheme to procure its annulment; and praying that the resolution of dismissal might be declared invalid:—*Held*, upon demurrer, that the Court was not justified in interfering:—*Held*, also, that although the Plaintiff was appointed by the old trustees in 1869, the new governing body were not bound by the rules and regulations in force previously to their appointment, but had a power of dismissal unfettered by those restrictions.—Demurrer allowed. Hayman *v.* Governors of Rugby School - - - - 28

DISSOLUTION OF PARTNERSHIP—*Pleading—Person of Unsound Mind not found so by Inquisition—Next Friend—Lunacy of Partner—Notice to dissolve—Withdrawal of Notice.*] Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner.—A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of the Plaintiff, alleging that the Plaintiff had for some time past been suffering from softening of the brain, and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and the share of the

DISSOLUTION OF PARTNERSHIP—*continued.*
Plaintiff in the assets secured for his benefit, and for a receiver:—*Held*, on demurrer, that the suit could be maintained.—Whether a decree for final dissolution can be made in such a suit without the appointment of a committee in lunacy, *quære.*—The articles of partnership between the Plaintiff and Defendant provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. The Plaintiff having become insane, the Defendant served on him notice of his intention to determine the partnership at the end of the first seven years of the term:—*Held*, that the notice could not be withdrawn without the consent of the Plaintiff. Jones *v.* Lloyd - 265

2. —— *Person of Unsound Mind — Next Friend.*] A bill was filed by a person of unsound mind not so found by inquisition by his next friend, against his partner, charging him with fraud and undue influence in inducing him to enter into the partnership, and asking for a declaration that the partnership was void. The Master of the Rolls ordered the proceedings to stand over for the fact of the Plaintiff's insanity to be established. The Plaintiff was afterwards found lunatic, and the suit was continued by the next friend as committee. The Court dismissed the bill as to the charges of fraud, but declared the partnership void. Fisher *v.* Melles - 268, n.

DISTRESS ON JOINT PROPERTY—*Landlord and Tenant—Rent—Tenants in Common—Attornment—Chattels in Joint Possession—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 34.] Two tenants in common mortgaged an estate to secure a debt which they jointly and severally covenanted to pay, and each of them separately attorned tenant to the mortgagees of a part of the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mortgage debt. The mortgagors were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:—*Held*, that the mortgagees could not distrain for the rent upon the partnership property which was on the estate. *Ex parte* Parke. *In re* Potter - - - - - - 381

DIVIDENDS—Shares in insurance company—Tenant for life and remainderman 696
See Dividends whether Income or Corpus.

—— Stock in company—Apportionment - 329
See Apportionment of Dividends.

DIVIDENDS WHETHER INCOME OR CORPUS—*Life and Fire Insurance—Shares—Tenant for Life and Remainderman.*] A holder of shares in both departments of the *Sun Fire and Life Office* bequeathed his personal estate to trustees on trust to permit his wife to receive the dividends, interest, and income thereof for her life, remainder over. He died in December, 1870. In January, 1873, an extraordinary dividend was declared on the life shares for five years previously; and in July, 1873, a "special dividend was declared on the fire shares for the half year previous:—*Held*, that these dividends were income, and belonged to the tenant for life. *In re* Hopkins' Trusts 696

DOCUMENTS—Production of - - 649
See Production of Documents.

DONATIO MORTIS CAUSÂ—*Railway Stock—Deposit Note—Incomplete Gift—Declaration of Trust.*] A husband, two years before his death, gave to his wife a railway debenture subsequently converted into railway stock, which remained in his name, and on which the dividends were received by him, but paid to his wife. He gave the certificates to his wife, and they remained in her possession until he required them in order to replace a lost dividend warrant. While on his death-bed he handed the certificates to his wife, saying, "these are yours," and also gave her a deposit note:—*Held*, that the gift of the stock failed as incomplete, and could not be supported as a declaration of trust, the intention to make an immediate gift being inconsistent with a declaration of trust:—*Held*, also, that railway stock cannot be the subject of *donatio mortis causâ*:—*Held*, also, on the authority of *Amis* v. *Witt* (33 Beav. 619), that the gift of the deposit note was a good *donatio mortis causâ*. Moore *v.* Moore [474

DOUBLE PORTIONS—Ademption legacy - 458
See Ademption.

EASEMENT—Alteration of—Ancient lights 544
See Light and Air.

ELECTION—*Annuity settled by Separation Deed—Bequest of similar Annuity—Satisfaction.*] *A.* by deed of separation covenanted with the trustee of the deed to pay him an annual sum of £52 during the life of *A.*'s wife, to be paid to her on four special quarterly days for her separate use, without power of anticipation. *A.*, by will, subsequently gave certain specific property to trustees to pay out of the rents an annuity of £52 to his wife generally, on the same special quarterly days:—*Held*, that there being no direction in the will to pay debts and legacies, and no expression of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the annuity covenanted to be paid by the deed of separation; and that the widow was put to her election. Atkinson *v.* Littlewood - - - - - - 595

ELEGIT—Equitable interest - - 298
See Judgment Creditor.

ENJOYMENT IN SPECIE—*Tenant for Life and Remainderman—Conversion—Wasting Securities—Long Annuities—Following Assets—Recouping by Tenant for Life paid in excess.*] A testator gave his residue to trustees on trust to convert and invest on Government or real securities, and to pay the income to his wife for life, and after her death to distribute the *corpus;* and he also empowered them to continue invested any of his Government stocks or real securities, and directed that his wife should be entitled to the interest, dividends, and annual proceeds of his residuary estate as from the pay of his decease:—*Held*, that the trustees were, under the will, empowered to retain such Government securities only as were of a permanent character; that certain long annuities, which formed part of the testator's estate, ought to have been sold and the proceeds invested on permanent securities; and that the widow's estate

ENJOYMENT IN SPECIE—*continued.*
was after her death liable to recoup to the testator's estate the amount which would have been produced by the sale of the long annuities, she having received in her lifetime the whole proceeds till they expired. Tickner *v.* Old - 422

EQUITABLE ASSIGNMENT—Bill of exchange
See Garnishee Order. [283

EQUITABLE INTEREST—Judgment creditor
See Judgment Creditor. [298

EQUITY TO A SETTLEMENT—*Husband defaulting Executor.*] Where a testatrix gave her residue among four, and appointed the husband of one of them sole executor, from whom, on the accounts being taken, there was found due a large balance which he was unable to pay:—*Held*, that the husband being indebted to the estate, and therefore disentitled to receive anything, no equity to a settlement arose in favour of the wife.—*Osborn* v. *Morgan* (9 Hare, 432) followed. Knight *v.* Knight - - - - - - 487

ESTATE TAIL—Child *en ventre sa mère*—Intermediate rents - - - 9
See Child en ventre sa mère.

ESTOPPEL—Breach of trust - - 215
See Purchase for Value without Notice.

EVIDENCE—Experts—Engineers—Land delineated on plans - - - 714
See Compulsory Powers.

—— Intention—Satisfaction of portion - 458
See Ademption.

—— Non-production of witness for cross-examination - - - - - 524
See Non-production of Witness.

—— Secondary—Mortgage deed - - 215
See Purchase for Value without Notice.

EXECUTION—Equitable interest in land - 298
See Judgment Creditor.

EXECUTOR—Appointment of debtor as executor
See Release of Debt. [315

—— Defaulting—Legacy to wife - - 487
See Equity to a Settlement.

—— Liability of - - - - 18
See Liability of Executor.

—— Joint retainer of solicitor—Costs - 680
See Joint Retainer of Solicitors.

FIRM OF SOLICITORS—*Joint and Several Liability—Money received by Partner—Ordinary Business of Solicitors—Parties—Non-joinder of Copartner—Laches.*] The Plaintiff, a married woman, and her husband, were clients of *J.* and *W.*, a father and son, who carried on business together in partnership as solicitors. In 1859 the Plaintiff became possessed to her separate use of a sum of £3000, which, in consequence of her husband's pecuniary difficulties, she was advised by the solicitors to invest without his concurrence. On the suggestion of *J.* and *W.* she advanced to them £1300, part of the £3000, which they required for another client to complete a purchase of an advowson, on the security of a written

FIRM OF SOLICITORS—*continued.*
undertaking signed by both to execute a legal mortgage of the advowson to her when the transaction was completed. The Plaintiff subsequently handed the remaining £1700 to *W.*, on the representation by him alone that it would be invested on mortgage of the real estate of another client. In January, 1865, *J.* died, having retired from the business in 1862, and in May, 1865, the Plaintiff was fraudulently induced by *W.* to execute a deed constituting him the sole trustee of the £3000, and empowering him to invest it as he thought proper, without being answerable for any loss. No legal mortgage of the £1300 was ever effected, and in 1868 it was paid off to *W.* under the authority of the deed of 1865, and it and the £1700, which had never been invested, were spent by *W.* He continued to pay the Plaintiff interest on these funds till November, 1871, and died insolvent in March, 1872:—*Held*, on bill against the executors of *J.* and *W.* (1) That *J.'s* estate was liable to make good the loss of the £1300: (2) That in consequence of the regular payment of interest by *W.*, laches was not attributable to the Plaintiff for not enforcing her rights sooner: (3) That the dealing with the £1700 was not part of the regular business of *J.* and *W.* as solicitors, and the receipt of it by one partner alone did not make the other partner liable, and *J.'s* estate was not liable to replace this fund.—During part of these transactions *C.* was also a partner with *J.* and *W.*, but he was not a party to the frauds, and no guilty knowledge was attributed to him:—*Held*, that the Plaintiff might proceed against any or all of the parties jointly and severally liable, and that *C.* was not a necessary party to the suit.—*Atkinson* v. *Mackreth* (Law Rep. 2 Eq. 570) considered. PLUMER *v.* GREGORY - 621

FOLLOWING ASSETS—Recouping by tenant for life - - - - - 422
See ENJOYMENT IN SPECIE.

FORECLOSURE SUIT—*Mortgage—Lands out of Jurisdiction.*] A foreclosure decree being a decree *in personam* depriving the mortgagor of his personal right to redeem, the Court has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land, in one of the colonies. PAGET *v.* EDE 118

FOREIGN ATTACHMENT—Fraud—Jurisdiction of Chancery - - - - 283
See GARNISHEE ORDER.

FOREIGN CONTRACT—*Jurisdiction of Court—Plaintiff and Defendant Foreigners — Contract Foreign — Subject-matter Foreign — Demurrer.*] Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to a foreigner part of the profits of the mine which were claimed by the Plaintiff, by way of commission, and also for an account of profits against the company.—Demurrer allowed. MATTHAEI *v.* GALITZIN - 340

FOREST OF DEAN—Forfeiture of lease - 389
See FREE MINERS.

FORFEITURE CLAUSE—*Will — Legacy — Forfeiture of Legacy if not "claimed" within Three Months.*] Direction by codicil to executors to
FORFEITURE CLAUSE—*continued.*
invest £200 and pay the proceeds to testator's daughter, a single woman, for life, for her separate use, and after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within three calendar months after testator's decease, the bequest should lapse.—The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of the testator's death till nearly two years after he died; and it was admitted by the executors that no notice was given to her by them:—*Held*, that the legacy had become forfeited, and had lapsed. POWELL *v.* RAWLE - - - - - - 243

—— Statute of Limitations—Ignorance of condition - - - - 290
See LIMITATIONS, STATUTE OF. 2.

FORFEITURE OF LEASE—*Forest of Dean* 389
See FREE MINERS.

FRAUD—Garnishee order—Jurisdiction of Chancery — - - - - 283
See GARNISHEE ORDER.

FRAUDS, STATUTE OF—*Sale of Real Estate—Memorandum of Agreement—Vendor not named, but described as Proprietor—Signature by Auctioneer.*] Upon a sale by auction of real estate in lots, the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor:—*Held*, that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the *Statute of Frauds;* and specific performance of the agreement decreed at the suit of the purchaser. SALE *v.* LAMBERT - - - 1

2. —— *Sale of Real Estate—Memorandum of Contract—Name of Vendor.*] In order to satisfy the requirements of the *Statute of Frauds*, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity. — The term "vendor" is not of itself a sufficient description of one of the contracting parties.—Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that *B.* was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and *B.* signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor. *B.*":—*Held*, that the memorandum did not sufficiently shew who the vendor was; and a bill for specific performance of the contract for sale was dismissed. POTTER *v.* DUFFIELD - - - - - 4

FREE MINERS—*Petition of Right—Forest of Dean—Non-payment of Rent—Conditions—Forfeiture of Lease.*] The gaveller of the *Forest of Dean* granted a gale or colliery to *J. B.*, a free miner, he paying for all coal brought out 2*d.* per ton, and so working the colliery as to gain 24,000 tons a year: Provided that if the coal gotten should not amount to that quantity, a minimum rent of £200 should be paid: Provided also, and

FREE MINERS—*continued.*
the grant was made upon the further condition, that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years; but upon arrears of rent becoming due, the gaveller declared the gale forfeited, and entered into possession thereof. Ten months after the declaration of forfeiture the galee tendered the arrears of rent, which were refused:—*Held*, upon a Petition of Right by the representatives of the galee to be reinstated in the gale, that the grant was properly made upon conditions, one of which was the payment of rent, that upon breach of that condition by non-payment, there had been a legal forfeiture and a right of the Crown to re-enter; and that the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the Court to relieve against the forfeiture.—*Quære*, whether the Court could have relieved if the Petition of Right had been presented within six months of the forfeiture. *In re* Brain - - - - - - - 389

FURTHER CHARGE—Yorkshire Registry Act
See Yorkshire Registry Act. [350

FUTURE PROPERTY—Covenant to settle 436
See Covenant to settle.

GALE—*Forest of Dean*—Forfeiture of lease 389
See Free Miners.

GARNISHEE ORDER—*Foreign Attachment—Jurisdiction—Garnishee—Equitable Assignment.*] *A.* issued an attachment out of the Lord Mayor's Court against *B.* as garnishee, and *C.* (a native Indian merchant of *Madras*) as Defendant, thereby attaching for a debt due to *A.*, and contracted in this country a fund belonging to *C.* in the hands of *B.* *A.'s* attachment was defeated by a prior attachment issued by *D.* for an alleged debt due from *C.*, on which judgment was obtained in the Lord Mayor's Court.—The fund having been transferred from the Lord Mayor's into this Court:—*Held*, that as *D.* had failed on the evidence to establish the validity of his alleged debt, his attachment was fraudulent, and the judgment based thereon inoperative, so that this Court had jurisdiction to order payment to *A.* out of the fund in Court of the amount of his debt, with interest from the date of his attachment in the Mayor's Court.—*B.* having a fund in his hands belonging to *C.*:—*Held*, that a bill of exchange drawn by *C.* on *B.* for the exact amount of the fund was not an equitable assignment.—The doctrine of *Burn* v. *Carvalho* (4 My. & Cr. 690) considered. Shand *v.* Du Buisson - - - - 283

GENERAL RULES IN BANKRUPTCY, 1870, r. 266
See Annulling Adjudication. [705

—— rr. 255, 256 - - - - - 704
See Meeting of Creditors. 1.

—— r. 260 - - - - - - 256
See Injunction in Bankruptcy.

—— rr. 271, 272, 275, 295 - - - 705
See Meeting of Creditors. 2.

—— r. 273 - - - - - - 373
See Withdrawal of Proof.

—— Forms No. 108, 110 - - - 704
See Meeting of Creditors. 1.

HEIR—Conversion—Infant's real estate—Sale by Court - - - - - 192
See Conversion.

HONORARY TRUST—*Will—Charity—Gift of Surplus after void Gift.*] Testator bequeathed to his executors £600 out of his pure personal estate upon trust to invest and apply the income in keeping in good repair all the tombstones and headstones of his relatives and himself in *G.* churchyard, and directed that any surplus that might remain after defraying yearly the expenses as before stated, should be given by his executors every year to poor pious members of the *Methodist Society* in *G.* above the age of fifty years:—*Held*, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor, discharged from the obligation of keeping the tombstones in repair. Dawson *v.* Small 114

HOTCHPOT CLAUSE—*Payments on account of Shares in Residuary Estate—Devastavit—Loss and partial recovery of Assets—Interest.*] A testator gave to several of his eight children real estates, and bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, and to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:—*Held*, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at £4 per cent. per annum from the testator's death; that the devises of the real estates must bring into account their estimated values as part of the principal; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares. Ackroyd *v.* Ackroyd 313

HUSBAND AND WIFE—Copyright—Married woman—Second edition - - 497
See Copyright in Book. 2.

—— Covenant to settle future property - 436
See Covenant to settle.

—— Wife's equity to a settlement - - 487
See Equity to a Settlement.

IMPERFECT TRANSFER—Voluntary gift 11
See Voluntary Gift.

IMPLICATION—Agreement with publisher—Second edition - - - 497
See Copyright in Book. 2.

INCOME OR CORPUS—Charge of annuity [411, 419
See Annuity charged on Corpus. 1, 2.

—— Dividends—Life insurance company - 696
See Dividends, whether Income or Corpus.

INCOMPLETE GIFT—Railway stock - 474
See Donatio Mortis Causâ.

INDEMNITY—Broker—Custom of Stock Exchange - - - - 182
See Custom of Stock Exchange.

—— Right of trustee to - - - 18
See Liability of Executor.

INFANT—Bill of review—Leave to file - 573
See Bill of Review.
—— Partition suit—Sale at request of infant 387
See Partition Suit.
—— Real estate—Sale by Court—Conversion 192
See Conversion.
INFRINGEMENT OF COPYRIGHT 444, 487
See Copyright in Book. 1, 2.
INJUNCTION—Bankruptcy—Action by creditor
See Injunction in Bankruptcy. [256
—— Bill *quia timet*—Right of shooting - 259
See Bill quia Timet.
—— Copyright—Infringement - 444, 497
See Copyright in Book. 1, 2.
—— Nuisance by licensee of landowner - 303
See Nuisance by Third Person.
—— Pollution of river - - - 172
See Pollution of River.
—— Railway company—Small excess of powers
See Compulsory Powers. [714
—— Threatening legal proceedings - 330
See Threatening Legal Proceedings.
—— Trade-mark - - - - 138
See Trade-mark.

INJUNCTION IN BANKRUPTCY — *Liquidation —Appointment of Receiver—Refusal of Court to register Resolutions — Jurisdiction to restrain Debtor from suing a Creditor.*] At the first meeting of the creditors under a liquidation petition, one person, who claimed to be the largest creditor, was ejected by force and not allowed to vote. Resolutions were passed by the other creditors present, but the registration of them was opposed by the excluded creditor, and the Court refused to allow them to be registered. The debtor soon afterwards commenced an action against the excluded creditor for a balance which he alleged to be due to him. At this time no order had been made for the discharge of a receiver, who had been appointed under the petition :—*Held*, that there was jurisdiction to restrain the debtor from proceeding with his action.—But the excluded creditor was required to undertake to apply within a fortnight either for an order to call a fresh first meeting of the creditors under the petition, or for an adjudication of bankruptcy against the debtor. *Ex parte* Taylor. *In re* Morrisy - - 256

INN OF COURT—*Demurrer—Bill by a Barrister against his Inn—Jurisdiction.*] On a demurrer to a bill filed by a barrister against his Inn, praying that the Society might be restrained from prosecuting an action on the bond executed by Plaintiff on being called to the Bar, and that such bond might be delivered up to the Plaintiff; and praying for a declaration that Plaintiff was entitled to retire from the Inn without undertaking not to practise at the Bar :—*Held*, that the Court had no jurisdiction, and demurrer allowed. Neate *v.* Denman - - 127

INSOLVENCY—Stock Exchange — Insolvency of principal - - - - 182
See Custom of Stock Exchange.
INTEREST—Hotchpot clause - - 313
See Hotchpot Clause.
—— Legacy out of real estate - - 301
See Interest on Legacies.
INTEREST—*continued.*
—— Repayment of money on reversal of judgment
See Reversal of Judgment. [659
—— Sums payable on engineer's certificate 154
See Interest on uncertain Sum.

INTEREST ON LEGACIES — *Will — Legacy payable out of Proceeds of Sale of Real Estate.*] Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay certain legacies: —*Held*, that interest on the legacies was payable from the period of a year after the testator's death. —*Pearson* v. *Pearson* (1 Sch. & Lef. 10), *Spurway* v. *Glynn* (9 Ves. 483), and *Shirt* v. *Westby* (16 Ves. 393), distinguished. Turner *v.* Buck 301

INTEREST ON UNCERTAIN SUM—*Railway Company and Contractor — Disputed Accounts — Demand of Payment—Interest—3 & 4 Will. 4, c. 42, s. 28—Costs.*] The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result shewed that he was entitled to a balance less than one-half of the sum which he had claimed to be due from the company :—*Held*, that the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the company to pay any, or under the statute 3 & 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time. *Mildmay* v. *Methuen* (3 Drew, 91), and *McIntosh* v. *Great Western Railway Company* (4 Giff. 683) observed upon. Hill *v.* South Staffordshire Railway Company - - - - 154

INVESTMENT—Lands Clauses Act—Costs
[338, 278
See Costs under Lands Clauses Act. 1, 2.
—— Sanctioned by the Court - - 280
See Investments sanctioned by the Court.

INVESTMENTS SANCTIONED BY THE COURT—*Investment—Cash under the Control of the Court—Change of Investment—Metropolitan Consolidated Stock—23 & 24 Vict. c. 38, s. 11.*] Stock in the funds belonging to a charity incorporated by Act of Parliament, and having power to invest in the public funds, may, under sect. 11 of the statute of 23 & 24 Vict. c. 38, be sold out for the purpose of reinvestment on any of the stocks, funds, and securities on which cash under the control of the Court may be invested.—Such funds may also be sold out and reinvested on Metropolitan Consolidated Stock under the *Metropolitan Board of Works Loans Act*, 1871. *In re* Clergy Orphan Corporation - - - - - 280

JOINT RETAINER OF SOLICITORS—*Executors Defendants—One Executor Debtor to Testator's Estate—Costs of Suit—Costs of Inquiries—Set-off —Taxation.*] Two executors, defendants in a suit, gave a joint retainer to a firm of solicitors.

JOINT RETAINER OF SOLICITORS—*continued.*
In the course of the proceedings it was certified by the Chief Clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—*Held*, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him.—*Re Colquhoun* (1 Sm. & Giff. App. 1; 5 D. M. & G. 35) and *Harmer* v. *Harris* (1 Russ. 155) observed upon. Watson *v.* Row - - - - - - - 680

JUDGMENT CREDITOR—*Equitable Interest in Land—Equitable Execution—Form of Decree—Law of Judgments Amendment Act* (27 & 28 *Vict. c.* 112).] A judgment creditor, who has sued out an elegit, but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding, and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties.—Form of decree in such a case. Wells *v.* Kilpin - - 298

JURISDICTION—Bankruptcy—Contempt of Court
See Contempt of Court. [701

—— Bankruptcy—Injunction against liquidating debtor - - - - 256
See Injunction in Bankruptcy.

—— Chancery—Fraudulent garnishee order 283
See Garnishee Order.

—— Foreclosure suit—Lands out of jurisdiction—Decree *in personam* - - 118
See Foreclosure Suit.

—— Foreign contract—Foreign subject-matter and parties - - - - 340
See Foreign Contract.

—— Suit by barrister against his Inn - 127
See Inn of Court.

—— Threatened violation of right - 259
See Bill quia Timet.

LACHES—Infringement of copyright - 444
See Copyright in Book. 1.

—— Official liquidator - - - 428
See Qualification of Director.

—— Trustee's accounts—Delay in filing bill 356
See Trustee's Accounts.

LAND—Boundaries of—Deposited plans - 714
See Compulsory Powers.

LAPSED SHARE—Real estate—Costs - 578
See Costs in Administration Suit.

LEASE—Forfeiture of—*Forest of Dean* - 389
See Free Miners.

LEGACY—Ademption - - - 458
See Ademption.

—— Forfeiture if not claimed - - 243
See Forfeiture Clause.

—— Interest on - - - - 301
See Interest on Legacies.

—— Restraint of marriage—Void condition 510
See Restraint of Marriage.

—— Specific apportionment - - - 329
See Apportionment of Dividends.

LEGAL ESTATE—Protection by notice - 556
See Protection by Legal Estate.

LEGATEE—Liability to refund - - 18
See Liability of Executor.

LIABILITY—Partners—Firm of solicitors - 621
See Firm of Solicitors.

—— Remote—Right of trustee to indemnity 18
See Liability of Executor.

—— Trustee—Ignorance of trustee - 634
See Liability of Trustee.

LIABILITY OF EXECUTOR—*Trustee and Cestui que Trust—Indemnity—Distribution of Residuary Estate with Notice of remote Liability—Following Assets—Refunding.*] A trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue in the proper execution of the trust.—Notice of remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund.—The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate; afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed:—*Held*, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund.—A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.—The above-mentioned testator had, by the settlement made on the marriage of one of his daughters, covenanted to bequeath or otherwise provide that a certain share of his residuary estate should go to her; and it was by the same settlement agreed that such share should be paid to the trustees and held by them on the trusts of the settlement. The testator accordingly bequeathed the proper share to his daughter, and it was paid by the executors to the trustees of the settlement:—*Held*, that the trustees were liable to refund equally with the other residuary legatees.—An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee, without any intermediate income. Jervis *v.* Wolferstan - - - - - 18

LIABILITY OF TRUSTEE—*Negligence—Ignorance of the existence of a Trust—Exoneration of Trustee from Liability—Costs.*] A testator, who died on the 25th of August, 1839, by his will, dated on the 16th of the same month, made a general devise to two trustees, whom he also appointed executors, of his real and personal estate, upon trust "so soon as possible after" his decease to convert the whole into money, and stand possessed of the proceeds for the benefit of the Plaintiff, his granddaughter, then an infant, and since married to

LIABILITY OF TRUSTEE—*continued.*
the co-Plaintiff. The only real estate of which he died possessed was the moiety of a public-house, and an adjoining piece of land, and the nature of his interest was a base fee, expectant on the death without male issue of a tenant for life; or contingent on the failure of such issue without the estate in tail male having been barred. One of the trustees died soon after the testator. On the 14th of May, 1849, the tenant for life died without issue, and possession of the property was taken by strangers to the present suit. In April, 1852, the granddaughter attained twenty-one, and the surviving trustee accounted to her for the personal estate, and obtained her release in full of all demands. Afterwards the facts respecting the real estate became partially known to the Plaintiffs, and application was made to the trustee, who said that he understood from the testator that if the testator were to die in the lifetime of the tenant for life the estate would be of no value to him; and that, accordingly, on the death of the testator, he (the trustee) made no further inquiries. Some title-deeds were shortly afterwards found and handed over by the trustee to the Plaintiffs; but, as they contended, not until after their claim had become statute-barred:—*Held*, as the result of evidence, that the deeds which came out of the trustee's possession were not sufficient to reveal the true state of the title.—The bill was filed against the trustee for an account of the rents and profits of the estate since the death of the tenant for life, and charging wilful default.—The trustee having died, and the suit having been revived against his representatives:—*Held*, on the ground of ignorance of the existence of the trust, that the trustee's estate was not liable, and bill dismissed, but without costs. Youde *v.* Cloud - - .. - - - 634

LICENSEE—Nuisance by—Liability of occupier of land - - - - 303
See Nuisance by Third Person.

—— Patent—Threatening legal proceedings 330
See Threatening Legal Proceedings.

LIFE INSURANCE—Extraordinary dividend in shares - - - - 696
See Dividends, whether Income or Corpus.

LIGHT AND AIR—*Alteration of Easement—User of Building—Relief in Equity.*] Where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights. *Heath* v. *Bucknall* (Law Rep. 8 Eq. 1) is overruled by *Staight* v. *Burn* (Law Rep. 5 Ch. 163). In considering the amount of injury caused to a Plaintiff by the obstruction of ancient lights the Court will have regard, not merely to the present, but also to the possible future use of the property. *Jackson* v. *Duke of Newcastle* (3 D. J. & S. 275) is overruled by *Yates* v. *Jack* (Law Rep. 1 Ch. 295).—The circumstances under which a Court of Equity will give relief against obstruction of ancient lights by way of injunction, or by way of damages, and under which it will grant an interlocutory injunction, considered. Aynsley *v.* Glover - - - - - 544

LIMITATION OF SUITS—Copyright—5 & 6 Vict. c. 45 - - - - - 444
See Copyright in Book. 1.

LIMITATIONS, STATUTE OF—*Express Trust*—(3 *&* 4 *Will.* 4, *c.* 27), *s.* 25—*Land on trust for Sale—Residuary Gift.*] Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:—*Held*, that the trust was an express trust within sect. 25 of the *Statute of Limitations*, and a decree for the execution of the trust of the unsold land made at the suit of a residuary legatee. *Pawsey* v. *Barnes* (20 L. J. (Ch.) 393) distinguished. Mutlow *v.* Bigg - - - - - 246

2. —— *Real Estate—Settlement—Conditional Limitation—Name and Arms Clause—Forfeiture for Non-compliance — Ignorance of Condition*—(3 *&* 4 *Will.* 4, *c.* 27), *ss.* 3, 4.] The terms "forfeiture" and "breach of condition" used in the statute 3 & 4 Will. 4, c. 27, ss. 3, 4, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage. Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition.—An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume the testator's name and arms; and it was provided, that in case any such person should fail or neglect so to do for twelve calendar months after he should become so entitled in possession, his estate and interest should cease, and the estate should go to the person who should be next in remainder and then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in *India*, and being ignorant of his rights under the will, did not comply with the clause:—*Held*, that the tenant in tail had not acquired a title by adverse possession, but that on his death, by virtue of the Act 3 & 4 Will. 4, c. 27, s. 4, the remainderman became entitled to the estate:—*Held*, also, that the remainderman's estate was forfeited by reason of his non-compliance with the name and arms clause. Astley v. Earl of Essex - - - 290

3. —— *Will before Wills Act—General Devise to Trustee — After-acquired Real Estate — Adverse Possession by Trustee.*] A testator, by a will dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death, his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a

LIMITATIONS, STATUTE OF—*continued.*
title by adverse possession, she sold the estate to a purchaser for value:—*Held*, upon bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed. *Board* v. *Board* (Law Rep. 9 Q. B. 48) distinguished. Paine *v.* Jones - - - - 320

LIQUIDATION BY ARRANGEMENT — Bankruptcy intervening - - 705
See Annulling Adjudication.

—— Failure of debtor to deliver up property 701
See Contempt of Court.

—— Injunction against debtor - - 256
See Injunction in Bankruptcy.

—— Meeting of creditors—First general meeting
See Meeting of Creditors. 1. 704

—— Meeting of creditors—Voting—*Ultrâ vires* resolution - - - - 705
See Meeting of Creditors. 2.

LIQUIDATOR—*Company—Winding-up—Severance of part of the Assets—Payments into Court.*] Where, in the winding-up of a company, part of the assets has to be severed from the rest to answer the claim of a creditor, upon which claim there are many incumbrances, and an arrangement has been come to between the incumbrancers, and sanctioned by the Court, rendering necessary the presentation of a petition and the appearance of the liquidators on the petition, they having paid the money into Court:—*Held*, that the liquidators are entitled to their costs of appearing on the petition, out of the fund in Court, but not their costs, charges, and expenses of investigating the claims, or of an abortive attempt at arrangement. *In re* Bonelli's Electric Telegraph Company. Cook's Claim (No. 2) - - - - - 656

LOCAL BOARD—Sewage works - - 172
See Pollution of River.

LONG ANNUITIES—Enjoyment in specie 422
See Enjoyment in Specie.

LUNACY—Partnership—Dissolution 265, 268, n.
See Dissolution of Partnership. 1, 2.

MARRIAGE—Restraint of—Void condition 510
See Restraint of Marriage.

MARRIAGE SETTLEMENT—Covenant to settle future property - - - 436
See Covenant to settle.

—— Personal representatives held to mean executors - - - - 686
See "Personal Representatives."

MATERIAL FACTS—Disclosure of - - 524
See Agent purchasing for himself.

MEETING OF CREDITORS—*Liquidation—First General Meeting—Notice of Meeting—Signature—Bankruptcy Rules*, 1870, *rr.* 255, 256—*Bankruptcy Forms of* 1870, *Nos.* 108, 110.] It is not necessary that the notice summoning the first general meeting of creditors under a liquidation petition should be signed by the debtor's attorney with his own hand.—The notice is sufficient if the attorney's name is subscribed by his clerk by his direction. *Ex parte* Hirst. *In re* Hirst - 704

2. —— *Voting—Secured Creditor—Bills of Exchange—Registration of Resolutions—Resolutions partly ultrà vires—Bankruptcy Act*, 1869, *ss.* 16, 40—*Bankruptcy Rules*, 1870, *rr.* 271, 272, 275, 295.] It is sufficient for the validity of the vote of a creditor who holds bills of exchange or promissory notes signed by the debtor if he produces the bills or notes before the registration of the resolutions upon which he has voted. If a secured creditor votes without producing his security his vote is valid, but his security is forfeited.—Where some of the resolutions passed by creditors are *ultrà vires*, the Court has power to direct the registration of the rest. *Ex parte* Ashworth. *In re* Hoare - - - - - 705

MESNE PROFITS—Child *en ventre sa mère* 9
See Child en ventre sa mère.

METROPOLITAN CONSOLIDATED STOCKS 280
See Investments sanctioned by the Court.

METROPOLITAN DISTRICT RAILWAY—Superfluous lands—Power to sell - 368
See Superfluous Lands.

MINE—*Forest of Dean*—Forfeiture of lease 389
See Free Miners.

MISREPRESENTATION BY PROMOTERS—*Unregistered Company — Winding-up — Circular — Contributories to the Extent of the Representation—Companies Act*, 1862, *ss.* 199, 200.] An undertaking having been set on foot for the purchase and alteration of a theatre, a partnership consisting of more than seven members was formed for the purpose. Two of the promoters, being members, issued a circular, in which was contained the following statement:—"The entire remodelling, redecorating, and furnishing will cost £12,000, and of this sum £5000 only remains for subscription." The partnership having been ordered to be wound up, as an unregistered company, under the 200th section of the *Companies Act*, 1862:—*Held*, that the two promoters must be settled on the list of contributories for all the balance of the unsubscribed-for capital up to £12,000. *In re* Royal Victoria Palace Theatre Syndicate. Moore and De la Torre's Case - - 661

MISTAKE—Non-registration of contract for paid-up shares - - - 16, 17, n.
See Contract for paid-up Shares. 1, 2.

—— Vendor and purchaser—Interest of vendor [633
See Specific Performance with Compensation.

MIXED FUND—Condition in restraint of marriage - - - - - 510
See Restraint of Marriage.

MORTGAGE—Composition with creditors—Collateral security - - - 249
See Creditor holding Security.

—— Forcelosure suit—Lands out of jurisdiction
See Foreclosure Suit. [118

—— Priority—Legal estate—Notice - 556
See Protection by Legal Estate.

—— Priority — Purchase for value without notice - - - - 215
See Purchase for Value without Notice.

MORTGAGE—*continued.*
—— Priority—Yorkshire Registry Act - 350
See Yorkshire Registry Act.
—— Raising portions—Costs - - 541
See Portions.
—— Reinvestment in, under Lands Clauses Act—Costs - - - - - 278
See Costs under Lands Clauses Act. 1.
—— Tenants in common—Attornment to mortgagee - - - - 381
See Distress on Joint Property.

MORTMAIN—*Charitable Legacy charged on Land—Statutory Exemption from Disability—Power to devise implied from Power to take by Will.*] A hospital was empowered by an Act of Parliament by which it was incorporated, by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain land for the purposes of the charity; and also by will, gift, purchase, or otherwise, to obtain, acquire, hold, and maintain, for the purposes of the charity, any kind of personal estate, including money secured on mortgage or charged on land:—*Held*, that those words implied a power to devise land for the use of the charity, and, therefore, that where a testator gave certain legacies to this as well as other charities out of a mixed fund of realty and personalty, the charity in question was entitled to receive the legacy in full. Perring *v.* Trail - - - - - 88

2. —— *Unpaid Rents—Charitable Bequests.*] There was also a sum of £861 due to the testator as arrears of rent from leaseholds, in respect of which ground-rent and other outgoings were payable:—*Held*, that the arrears of rent due were not liable to reduction for ground-rent and outgoings, but must be treated as pure personalty.—There was a further sum of £2202, due for the apportionment of the quarter's rent of leasehold estates:—*Held*, that this was pure personalty.—The will contained a bequest of £200 to each of ten poor clergymen of the Church of *England*, to be selected by his friend, *J. O.*:—*Held*, that these were not charitable legacies, but were payable out of the testator's general estate.—Gift by will of legacies of £200 each to twenty charitable institutions, followed by a gift by a codicil as follows:—"Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4000 more to the established institutions of the country, making it together £8000:—*Held*, that the gift was conditional on the income of the estate amounting to the specified sum, and that not being the case the gift failed.—*Attorney-General* v. *Lloyd* (1 Ves. Sen. 32) not followed. Thomas *v.* Howell 198

NAME AND ARMS CLAUSE—Forfeiture—Ignorance of condition - - - 290
See Limitations, Statute of. 2.
NATIONAL SOCIETY—School—Transfer to School Board - - - - 608
See Transfer of School to School Board.
NEGLIGENCE—Trustee accounts—Costs - 356
See Trustee's Accounts.
—— Trustee—Ignorance of - - - 634
See Liability of Trustee.

"NEPHEWS AND NIECES"—*Will—Niece by Affinity.*] Testatrix, after giving a specific bequest to *A. B.*, who was her husband's niece, but whom she there described as "my niece, *A. B.*," afterwards gave the residue of her property thus: "unto all my nephews and nieces":—*Held*, that the nephews and nieces by blood of the testatrix were entitled to the residue, to the exclusion of *A. B.*—*Grant* v. *Grant* (Law Rep. 5 C. P. 380, 727) disapproved. Wells *v.* Wells - 504

NEXT FRIEND—*Person of Unsound Mind—Partnership—Practice.*] A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner.—The jurisdiction of the Court of Chancery with respect to suits instituted by persons of unsound mind, not so found by inquisition, by next friends, considered. Jones *v.* Lloyd - - - - - - 265

NIECE—By affinity—Will - - - 504
See "Nephews and Nieces."

NON-CLAIMER—Legacy—Forfeiture - 243
See Forfeiture Clause.

NON-PRODUCTION OF WITNESS.] At the hearing of a cause on replication, the Plaintiff proposed to read the affidavit of a witness occupying an official position in the *United States*. Notice to cross-examine this witness had been given, and he had come over to this country for the purpose of being cross-examined, but had been obliged to return before the cause came on to be heard. The Plaintiff had given the Defendant only one day's notice before the witness left the country:—*Held*, that the affidavit could not be read. Dunne *v.* English - - - - - 524

NOTICE — Dissolution of partnership — Withdrawal - - - - 265
See Dissolution of Partnership. 1.
—— First meeting of creditors—Liquidation by arrangement - - - 704
See Meeting of Creditors. 1.
—— Protection by legal estate - - 556
See Protection by Legal Estate.
—— To treat—Abandonment—Costs - 338
See Costs under Lands Clauses Act. 2.
—— To treat—Delineation on plans - 714
See Compulsory Powers.
NUISANCE—Licensee of landowner - 303
See Nuisance by Third Person.
—— Pollution of river—Sewage works - 172
See Pollution of River.

NUISANCE BY THIRD PERSON—*Injunction—Liability of Occupier of Land for Acts of his Licensee—Practice—Parties.*] Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a Defendant to a suit to restrain the nuisance. White *v.* Jameson - - 303

OCCUPIER—Duty of—Licensee—Nuisance 303
See Nuisance by Third Person.
ONUS PROBANDI—Agent purchasing for his own benefit - - - - 524
See Agent purchasing for himself.

ORDINARY BUSINESS—Solicitors—Liability of firm - - - - - 621
See Firm of Solicitors.

PAID-UP SHARES — Contract for — Companies Act, 1867, s. 25 - **16, 17, n., 95, 542**
See Contract for paid-up Shares. 1-4.

PARLIAMENTARY POWERS — Local Board — Sewage works - - - 172
See Pollution of River.

PARTIES—Bill to restrain—Nuisance by licensee of landowner - - - 303
See Nuisance by Third Person.

—— Foreign—Foreign subject-matter - 340
See Foreign Contract.

—— Non-joinder of co-partner - - 621
See Firm of Solicitors.

PARTITION SUIT—*Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 3—*Sale at "Request" of Infant.*] In a suit under the *Partition Act*, 1868, for the confirmation of a conditional contract for sale of certain land to which the infant Plaintiff and the infant Defendant were entitled as co-heiresses, subject to the dower of their mother, an order was made confirming the conditional contract and directing a sale, and the decree was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant Plaintiff requested a sale. Grove *v.* Comyn - - - 387

PARTNERSHIP—Dissolution—Lunacy - **265, [268, n.**
See Dissolution of Partnership. 1, 2.

—— Distress on partnership property - 381
See Distress on Joint Property.

—— Liability—Firm of solicitors - - 621
See Firm of Solicitors.

—— Person of unsound mind not so found—Next friend - - - - 265
See Next Friend.

PAYMENT — Into Court after decree, before further consideration - - 524
See Payment into Court.

—— Petitioning creditor's debt - - 375
See Petitioning Creditor.

—— Out of Court - - - **279, 658**
See Payment out of Court. 1, 2.

—— Reversal of judgment—Interest - 659
See Reversal of Judgment.

—— Shares—Money's worth - - 670
See Payment for Shares by Money's Worth.

PAYMENT FOR SHARES BY MONEY'S WORTH —*Company—Cancellation of Contract—Application of Compensation Money in crediting Shares with Payment of Future Calls—Companies Act*, 1867, *s.* 25.] A company, being at the time in great pecuniary difficulties and under an onerous contract with *B.*, one of their directors, entered into an agreement with *B.* by which he agreed to annul his contract and give the company the benefit of a more beneficial sub-contract upon receiving £12,000 compensation, which it was thereby agreed should be paid by crediting the shares standing in his name with a payment of £1800 (thereby making the same fully paid up), an acceptance for £200, and the remaining £10,000 in fully paid-up shares, to be issued at certain contingent periods. Within two months after the execution and registration of this agreement, a petition, on which an order was ultimately made, was presented for winding up the company:—*Held*, that the effect of the arrangement under which *B.* had applied, in paying up his shares, money legitimately coming to him as compensation for giving up a beneficial contract, was to discharge *B.* from all liability in respect of those shares. *In re* Paraguassu Steam Tramway Company. Adamson's Case - - 670

PAYMENT INTO COURT—*After Decree—Before further Consideration.*] A Defendant whose affidavit filed on an inquiry discloses that he has money in his hands may be ordered to pay it into Court after decree and before further consideration. Dunne *v.* English - - - 524

PAYMENT OUT OF COURT—*Lands Clauses Act—Charity—Trustees—Persons absolutely entitled.*] A fund in Court, paid in under the *Lands Clauses Consolidation Act*, as the price of charity land, may be paid out to the trustees of the charity, as being persons absolutely entitled thereto. *In re* Spurstowe's Charity - - - 279

2. —— *Practice—Lands Clauses Act—Charity—Payment to Secretary.*] Order for investment of the proceeds of lands belonging to a charity, which had been taken under the *Lands Clauses Consolidation Act*, and payment until further order of the interest to the secretary, and to his successors the secretaries for the time being, of the trustees of the charity, of which there was no treasurer. *In re* Codrington's Charity - 658

PERIOD OF VESTING—Appointed share - 587
See Vesting of Appointed Share.

"PERSONAL REPRESENTATIVES" — *Held to mean "Executors"—Marriage Settlement.*] By a marriage settlement, the wife's real and personal estate was assigned to trustees on trust to pay the annual income to husband for life, remainder to wife for life, remainder as she should by deed or will appoint; and in default for her personal representatives. The wife pre-deceased her husband, intestate and without issue. After the husband's death, his executors took out administration of the wife's estates:—*Held*, that they were entitled to the fund. *In re* Best's Settlement Trusts - - - - - 686

PETITION—Service out of jurisdiction - 655
See Service out of Jurisdiction.

PETITION OF RIGHT—*Forest of Dean*—Forfeiture of lease - - - 389
See Forfeiture of Lease.

PETITIONING CREDITOR—*Bankruptcy Petition—Debtor's Summons—Offer of Debtor to pay—Creditor's Right to Adjudication—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 8, 9, 80, *sub-s.* 10.] After a bankruptcy petition has been presented, and before adjudication, the petitioning creditor is not bound to accept payment, although, *semble*, he is at liberty to do so, but is entitled to insist upon an adjudication on proving his debt and the commission of an act of bankruptcy; and this as well in the case of an act of bankruptcy under a debtor's summons as in any other. *Ex parte* Boss. *In re* Whalley - - - 375

PIRACY—Copyright—Limitations of Suits—Acquiescence - - - - 444
See Copyright in Book. 1.

PLEADING — Next friend — Person of unsound mind - - - - - 265
See Next Friend.

—— Non-joinder of co-partner - - 621
See Firm of Solicitors.

POLLUTION OF RIVER—*Public Body—Parliamentary Powers — Information — Injury to the Public—Nuisance—Local Board—Sewage Works —Outfall without District—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 45, 46—*Local Government Act* (1858) *Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *s.* 4.] Upon an information filed by the Attorney-General to restrain a public body from transgressing powers conferred by an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and in this respect there is no difference between an *ex-officio* information and an information at the relation of a private individual.—The *Local Government* (1858) *Amendment Act*, 1861 (24 & 25 Vict. c. 61), s. 4, enables local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse":—*Held*, that a local board is not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge.—The *C.* local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at the town of *W.*, situated eight miles farther down, and supplied with water for domestic purposes from the river. Upon an information and bill filed by the local board of *W.* (in whom the *W.* waterworks were vested), as relators and Plaintiffs seeking to restrain the *C.* local board from so discharging the sewage, on the ground that their acts were, first, an infringement of the above-mentioned provisions of the *Local Government Act*, 1861, and, secondly, a nuisance to the inhabitants of *W.*:—*Held*, that upon the information an injunction to restrain the Defendants from infringing the Act of Parliament must be granted with costs; but that the bill, which sought to make out a case of nuisance, must be dismissed with costs. Attorney-General *v.* Cockermouth Local Board - 172

PORTIONS—*Power to raise Portions by Mortgage —Costs of Mortgage.*] A power in trustees to raise by mortgage a fixed sum implies a power to raise also the incidental costs of the mortgage. Armstrong *v.* Armstrong - - - 541

POWER—Appointment—Period of vesting 587
See Vesting of appointed Share.

POWER—*continued.*
—— To raise portions—Costs - - 541
See Portions.
—— To take lands by devise—Charity - 88
See Mortmain. 1.

PRACTICE—Bill of Review - - 573
See Bill of Review.
—— Costs under Lands Clauses Act 278, 338
See Costs under Lands Clauses Act. 1, 2.
—— Investment of money in Court - 280
See Investments sanctioned by the Court.
—— Next friend—Person of unsound mind 265
See Next Friend.
—— Partition suit—Infant - - - 387
See Partition Suit.
—— Payment into Court after decree before further consideration - - 524
See Payment into Court.
—— Payment out of Court—Lands Clauses Act [279, 658
See Payment out of Court. 1, 2.
—— Production of documents - - 649
See Production of Documents.
—— Petition—Service out of jurisdiction - 655
See Service out of Jurisdiction.
—— Reversal of judgment—Repayment of money interest - - - - 659
See Reversal of Judgment.
—— Short cause—Rule of Court - - 92
See Short Cause.
—— Witness—Non-production for cross-examination - - - - - 524
See Non-production of Witness.

PRECATORY TRUST—*Will—Construction—"In full Confidence"—Trust for Children.*] Gift by will to the testator's wife of all property whatsoever that he might die possessed of "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just and equitable spirit, and in such manner and way as she feels would meet with my full approval":—*Held*, on demurrer, that the widow took a life interest, with a power of disposition amongst the children, the actual extent of which must be determined at the hearing of the cause. Le Marchant *v.* Le Marchant - - 414

PRIORITY—Mortgage—Yorkshire Registry Act
See Yorkshire Registry Act. [350

PRIVATE CHARITY—Gift to ten poor clergymen
See Mortmain. 2. [198

PRIVILEGED COMMUNICATION—Production of documents - - - - 649
See Production of Documents.

PROCEEDS OF TIMBER - - - 306
See Waste.

PRODUCTION OF DOCUMENTS—*Practice—Privilege—Cases and Opinions of Counsel, and of an ex-Chancellor.*] From copies of letters written before the litigation by a Plaintiff to one of the Defendants, it appeared that the former had taken, 1, opinions of counsel, and, 2, the friendly opinion of Lord *Westbury*, then an ex-Chancellor, on points which afterwards became part of the

PRODUCTION OF DOCUMENTS—*continued.*
subject-matter of the litigation.—Plaintiff, in answer to an application to produce these opinions and the cases on which they were founded, objected, on the ground that "they were written in anticipation of and in relation to the litigation." He did not say they were confidential communications:—*Held*, that he was bound to produce both classes of documents. Smith *v.* Daniell 649

PROOF IN BANKRUPTCY—Withdrawal of 373
See Withdrawal of Proof.

PROMOTERS—Unregistered company—Misrepresentation - - - - 661
See Misrepresentation by Promoters.

PROTECTION BY LEGAL ESTATE—*Prior Equity—Notice—Trustee—Costs.*] Where money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has notice that his mortgagor has made himself a trustee for the owner of the prior equity. Whether he would be in any better position if he had no notice, *quære.*—A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an under-lease to *M.*, who gave valuable consideration for the under-lease, and entered into possession. Subsequently the builder, without the knowledge of *M.*, obtained a lease of the house, and deposited it with the Defendant to secure an advance made without notice of *M.'s* title. After this the builder, as agent for the Plaintiff (who claimed under *M.'s* will), let the house to a tenant. Subsequently the builder granted to the Defendant a legal mortgage to secure the previous advance. The suit was instituted for specific performance of the agreement for an under-lease:—*Held*, that the tenancy gave the Defendant constructive notice at the time of taking the legal mortgage that the builder was a trustee for *M.*; and that the legal estate was no protection to the Defendant against the prior equity; and a decree was made for specific performance, but, having regard to the negligence of *M.*, without costs. Mumford *v.* Stohwasser - - - 556

PUBLIC BODY—Local Board—Pollution of river
See Pollution of River. [172

PUBLIC INJURY—Pollution of river - 172
See Pollution of River.

PUBLIC SCHOOL—Dismissal of schoolmaster—Public Schools Act, 1868 - - 28
See Dismissal of Schoolmaster.

PUBLISHER—Agreement with - - 497
See Copyright in Book. 2.

PURCHASE FOR VALUE WITHOUT NOTICE—*Trustee and Cestui que Trust—Breach of Trust—Mortgage — Priority — Estoppel—Delivery up of Title Deeds—Secondary Evidence.*] In 1856, *A.* and *B.*, being trustees of £7000, invested it on mortgage of freeholds, of which *C.* was owner. The mortgage was negotiated by *B.*, who was a solicitor, and had for some time been engaged in various transactions with *C.* and acted for him professionally. The business arrangements of the trust, including payment of the income to the *cestui que trust*, were carried on by *B.*, no active part being taken by *A.*, who was a clergyman, and frequently absent abroad for his health. In 1859, *C.*, with the knowledge and authorization of *B.*, but without the knowledge of *A.*, sold a portion of the mortgaged property to *D.* Upon this sale all notice of the mortgage was suppressed. The title deeds were handed to *D.*, and the purchase-money, £3000, was received by *B.*, who gave *C.* a receipt "for self and co-trustee," promising to obtain *A.'s* execution of a reconveyance on his return to *England.* In 1870 *C.* contracted to sell a further portion of the property to *E.*, and in the course of the transaction, on pressing for a reconveyance, was informed by *B.* that he had misappropriated the £3000. Upon the representation that *C.* had succeeded in selling portions of the mortgaged properties for £4500, *A.*, who was wholly ignorant of the real state of the case, was induced by *B.* to execute—1, a conveyance by direction of *C.* to *E.*, as purchaser for £4500; and, 2, a reconveyance to *C.*, in consideration of an alleged payment of £3000, of the portions already sold to *D.* (to enable *C.*, as it appeared, to convey this portion separately to a purchaser).—Upon receiving the reconveyance, *C.* executed the conveyance and completed the sale to *E.*, and the purchase-money (£1500) was handed over to *B.*, who shortly afterwards absconded with the mortgage-deed in his possession:—I. *Held*, (*a*), that *A.* was entitled to have the reconveyance of 1870 cancelled as obtained by fraud; and, (*b*), that the estate supposed to have been acquired by *C.* under such reconveyance having been destroyed, there had been no subsequent acquisition of title by *C.* so as to perfect against *A.*, by estoppel, the defective title which *D.* acquired under his purchase from *C.* in 1859.—II. *Held*, also (following *Colyer* v. *Finch* (5 H. L. C. 905)), that the relief sought against *D.* being to compel him to redeem *A.'s* prior mortgage, or in default to stand foreclosed, the doctrine that the Court will not interfere as against purchasers for value without notice, did not apply; and that upon the failure of *D.* to redeem, *A.* was entitled to realise his security (except as to the part sold to *E.*, against whom the bill was dismissed) by a sale, and to have the title deeds in the possession of *D.* delivered up.—Secondary evidence of the mortgage deed of 1856 under the circumstances admitted. Heath *v.* Crealock [215

QUALIFICATION OF DIRECTOR — *Company — Contributory—Withdrawal from Office—Lapse of Time.*] In March, 1865, *G.* was asked by the board to become a director of a limited company. He attended two board meetings in March and April and signed the attendance book. He also saw and permitted to be issued in April, for the purpose of raising further capital, a prospectus, in which his name appeared as a director of the company. On the 4th of May *G.* wrote to say, that as his name had been of no assistance to the company, he would withdraw. On being afterwards asked by the secretary to qualify as director, he wrote on the 2nd of June to say that if the secretary considered he (*G.*) remained as director of the company, he (*G.*) begged leave again to

QUALIFICATION OF DIRECTOR—*continued.*
withdraw; and that he had no intention of departing from his letter of earlier date. *G.* never received any director's fees; he did not expressly agree to take, nor did he apply for any shares, and none were ever allotted to him; nor was any further step taken until the winding-up of the company in 1870. No application was made against *G.* in the winding-up until the year 1874. —The Court having found upon the facts that *G.* never had a fixed intention of becoming a director, though for some weeks he was so called:—*Held* (independently of the lapse of time), that *G.* was not liable to be placed on the list of contributories for the qualification number of shares; and summons of official liquidator, seeking to have him settled on the list, dismissed, but without costs. *In re* Freehold and General Investment Company. Green's Case - - - 428

RAILWAY COMPANY—Costs—Lands Clauses Act - - - - 278, 338
See Costs under Lands Clauses Act. 1, 2.

—— Compulsory powers—Notice to treat - 714
See Compulsory Powers.

—— Scheme of arrangement - - 566
See Scheme of Arrangement.

—— Superfluous lands - - - 368
See Superfluous Lands.

RAILWAY STOCK—Donatio mortis causâ 474
See Donatio Mortis Causâ.

REAL ESTATE—Apportionment of—Fund representing real estate - - - 213
See Apportionment—Tenant for Life and Remainderman.

—— Proceeds of sale—Condition in restraint of marriage - - - - 510
See Restraint of Marriage.

—— Undisposed of—Costs of administration 578
See Costs in Administration Suit.

RECEIVER—*Will—Tenant for Life and Remaindermen—Trustees to pay Debts out of Rents—Sales of Parts of Estates—Tenant for Life entitled to Possession.*] Testator, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts and sums of money as he should owe at the time of his decease, whether by way of mortgage, bond, or otherwise, including a sum of £8000 charged upon the estates; and he directed that the rents and profits of the estate should be received by the trustees and be applied in liquidation of the debts until the whole, including the £8000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disincumbered and clear of debts; and that the trustees should invest the moneys which come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the £8000, by sales of parts of the estates under orders of the Court, and there was an accumulation fund in Court sufficient to pay

RECEIVER—*continued.*
the £8000. On adjourned summons:—*Held*, that the receiver must be discharged, and the tenant for life be let into possession of the estates. Tewart *v.* Lawson - - - - 490

—— Liquidation—Appointment before registration of resolution - - - 256
See Injunction in Bankruptcy.

RECTIFICATION—Register of shareholders [16, 17, n., 542
See Contract for paid-up Shares. 1, 2, 4.

REGISTRATION—Contract for paid-up shares [16, 17, n., 95, 542
See Contract for paid-up Shares. 1—4.

—— Resolution of creditors—Liquidation 205
See Meeting of Creditors. 2.

—— Yorkshire Registry Act—Priority - 350
See Yorkshire Registry Act.

RELEASE OF DEBT—*Appointment of Debtor as Executor—Intention to forgive Debt—Incomplete Gift.*] *B.* borrowed £1100 from his stepmother, who lived in his house, paying £212 10*s.* a quarter for board; and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of £212 10*s.*, and continued down to the time of her death (which took place more than four years afterwards) to pay to *B.* the like quarterly sum. *B.* was appointed sole executor of his stepmother, and proved the will: and a suit for administration was instituted:—*Held*, that the debt was gone: first, because the appointment of *B.* as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give *B.* the sum of £900 was completed by nine quarterly payments of £212 10*s.* each. Strong *v.* Bird - - - 315

RENT—Distress—Tenants in common - 381
See Distress on Joint Property.

—— Intermediate—Child *en ventre sa mère*—Residuary devise - - - 9
See Child en ventre sa mère.

—— Unpaid—Gift of—Mortmain - 198
See Mortmain. 2.

REPUGNANT GIFT—*Will—Gift for absolute Use of Legatee—Subsequent Bequest of Money remaining after Death of Legatee.*] Testator gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson; and all the money (if any) that should be remaining after payment of his wife's just debts, he gave to legatees, named as tenants in common, equally. The widow died shortly after the testator, intestate:—*Held*, that she took an abso-

REPUGNANT GIFT—*continued.*
lute interest in the residuary personal estate, and that it belonged to her next of kin. Perry *v.* Merritt - - - - - - 152

RESCISSION OF ALLOTMENT—*Company—Ultrà Vires Contract.*] A company was formed in 1871 with a capital divided into shares of £5 each. The capital not having been all taken up, the directors passed a resolution that each of the existing shareholders should have the option of taking the unissued shares at £1 each in proportion to his holding. Allotments were made of shares in pursuance of this resolution to various persons, including *B.*, one of the directors. Afterwards it was discovered that the transaction was *ultrà vires*, and the directors passed a resolution rescinding their previous resolution and the allotments, and *B.*'s name was never placed on the register of shareholders in respect of them. The company having been wound up compulsorily:—*Held*, that the rescission was valid, and that *B.* was not a contributory in respect of the shares so allotted to him. *In re* Essex Brewery Company. Barnett's Case - - - - - - 507

RESOLUTION—Liquidation—Meeting of creditors—Registration - - - 705
See Meeting of Creditors. 2.

—— *Ultrà vires*—Rescission of allotment - 507
See Rescission of Allotment.

RESTRAINT OF MARRIAGE—*Legacy—Condition—Fund arising from Proceeds of Sale of Realty—Mixed Fund.*] A condition subsequent in restraint of marriage is void if annexed to a gift of the income arising from a mixed fund consisting of the proceeds of sale of real estate and pure personal estate:—*Semble*, such a condition is also void if the gift be of income of a fund arising from the proceeds of sale of realty only. Bellairs *v.* Bellairs - - - - - - 510

RESTRAINT OF TRADE—*Bond—Condition—Consideration—Continuance of previous Engagement—Right to dismiss at Will—Interlocutory Injunction.*] A legal consideration of any value is sufficient to support a contract in partial restraint of trade; and the Court will not inquire as to its adequacy.—The Plaintiff, a surgeon, engaged the Defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Subsequently the Defendant, previously to going up to pass his examination, executed, at the request of the Plaintiff, a bond, which was conditioned to be void if the Defendant should not practise within certain limits, but which contained no express agreement on the part of the Plaintiff to continue the Defendant's employment. The Defendant remained in the Plaintiff's employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was instituted to restrain him from so doing:—*Held*, that an agreement by the Plaintiff to continue the Defendant's employment on the old terms could be inferred; that there was consideration to support the bond; and that the Plaintiff was entitled to an injunction:—*Held*, also, that the point was one that ought to be

RESTRAINT OF TRADE—*continued.*
decided on motion without waiting for the hearing. Gravely *v.* Barnard - - - 518

REVERSAL OF JUDGMENT — *Repayment of Amount of Judgment—Interest.*] Persons who by the order of an inferior Court have been improperly compelled to pay money to their opponents in the suit, are, upon the reversal of such order by a Court of Appeal, entitled to have the amount repaid with interest at 4 per cent. from the time of payment. Merchant Banking Company *v.* Maud - - - - - 659

RIGHT OF SPORTING—Threatened violation 259
See Bill quia Timet.

RIVER—Pollution of - - - 172
See Pollution of River.

SALE—By Court—Infant's real estate—Conversion
See Conversion.

—— Land—Conditional acceptance - 180
See Conditional Acceptance.

—— Partition suit—Infant - - - 387
See Partition Suit.

—— Real estate—Statute of Frauds - 1, 4
See Frauds, Statute of. 1, 2.

—— Real estate—Trust for sale—Interest 301
See Interest on Legacies.

—— Superfluous lands—Metropolitan District Railway - - - - 368
See Superfluous Lands.

SATISFACTION—Annuity settled by deed—Gift by will - - - - 595
See Election.

—— Legacy - - - - - 458
See Ademption.

SCHEME OF ARRANGEMENT—*Insolvent Railway Company—Suspense Period—Liabilities existing at Date of Arrangement—Substitution of Debenture Stock for Debentures.*] An Act which was passed with a view to relieving a railway company from pressure by its creditors provided for the issue of several different classes of irredeemable debenture stock to judgment debtors and different classes of debenture holders in substitution for their existing securities, and another class of debenture stock for arrears of interest on debentures existing at the date of the passing of the Act, and thereby treated as being capitalised; and a suspense period was created within which no action or suit was allowed to be commenced without leave, except in respect of liabilities contracted after the passing of the Act, with certain specified exceptions:—*Held*, that the debenture stock so issued was within the protection of the Act, and that the holders were not entitled without leave to institute a suit for the purpose of obtaining payment of interest in arrear. London Financial Association *v.* Wrexham, Mold, and Connah's Quay Railway Company - - - 566

SCHOOL—Transfer to School Board—Conditions of foundation - - - 608
See Transfer of School to School Board. [608

SCHOOLMASTER—Dismissal of—Public Schools Act, 1868 - - - - 28
See Dismissal of Schoolmaster.

SECOND EDITION—Copyright in book—Implied agreement with publisher - - 497
See Copyright in Book. 2.

SEPARATE ESTATE—French law of community *See* Vesting of appointed Share. [587

—— Copyright—Agreement with publisher 497
See Copyright in Book. 2.

SERVICE OUT OF THE JURISDICTION—*Practice—Petition.*] Where a respondent to a petition was out of the jurisdiction, the Court made an order for substituted service, and also gave leave to the petitioner to serve the respondent abroad. *In re* Bonelli's Electric Telegraph Company. Cook's Claim - - - - - 655

SET-OFF—Banker's balance—Advance by banker *See* Banker's Account. [198

—— Debt of agent—Rents—Commission - 198
See Set-off of Debt of Agent.

—— Two executors—One indebted to testator—Costs of suit - - - - 680
See Joint Retainer of Solicitors.

SET-OFF OF DEBT OF AGENT—*Commission.*] At the death of a testator a sum of £90 for rents collected, but not paid over, remained in the hands of his agent, and a larger sum was due to the agent for commission on rents collected:—*Held*, that the £90 must be set-off against the larger sum due for commission, and was not to be treated as an asset of the testator. Thomas *v.* Howell - - - - - - 198

SETTLEMENT — Covenant to settle future property - - - - - 436
See Covenant to settle.

—— Name and arms clause—Statute of Limitations - - - - - 290
See Limitations, Statute of. 2.

—— Personal representatives held to mean executors - - - - - 686
See "Personal Representatives."

—— Wife's equity to - - - - 487
See Equity to a Settlement.

SEWAGE—Pollution of river—Board of works *See* Pollution of River. [172

SHARES—Crediting future calls—Payment by money's worth - - - 670
See Payment for Shares by Money's Worth.

—— Extraordinary dividend - - 696
See Dividends whether Income or Corpus.

—— Paid-up, contract for—Companies Act, 1867 [16, 17, n., 95, 542
See Contract for paid-up Shares. 1—4.

SHORT CAUSE—*Rule as to Hearing.*] The Court laid down the following rule for hearing short causes:—The certificate of Plaintiff's counsel is a *primâ facie* ground for setting down the cause. The Defendant who has not consented may appear, and if he can shew any fair reason why it should not be heard as a short cause, it will go into the general list; but otherwise it will be heard without the Defendant's consent as a short cause.—In a suit by a Plaintiff claiming to be one of the next of kin of an intestate against the

SHORT CAUSE—*continued.*
administrator (the Solicitor to the Treasury) the cause was heard short, and a decree was made, notwithstanding that the Defendant objected on the ground that a search was being prosecuted for documents which, if found, would prove the Plaintiff to be illegitimate. Felstead *v.* Gray [92

SOLICITOR—Liability of firm for misappropriation by one - - - - 621
See Firm of Solicitors.

—— Signature of notice of meeting of creditors—Liquidation by arrangement - 704
See Meeting of Creditors. 1.

—— Joint retainer by two Defendants - 680
See Joint Retainer of Solicitors.

SPECIFIC LEGACY—Apportionment - 329
See Apportionment of Dividend.

SPECIFIC PERFORMANCE—Conditional—Acceptance of offer - - - 180
See Conditional Acceptance.

—— Mistake in interest of vendor—Compensation - - - - - 683
See Specific Performance with Compensation.

—— Statute of Frauds—Vendor not named 1, 4
See Frauds, Statute of. 1, 2.

SPECIFIC PERFORMANCE WITH COMPENSATION—*Vendor and Purchaser—Agreement to sell Entirety of Fee Simple—Interest in Moiety—Abatement.*] Vendors agreed to sell the entirety of certain freehold property for the sum of £6000, and to make out a good marketable title. The purchaser, in consequence of delays on the part of the vendors, filed a bill for specific performance of the agreement. It was subsequently discovered that the vendors were entitled to only a moiety of the property:—*Held*, that the purchaser was entitled to a decree for specific performance of the agreement by the vendors of their moiety, with an abatement of one-half of the purchase-money.—*Barnes* v. *Wood* (Law Rep. 8 Eq. 424) and *Castle* v. *Wilkinson* (Law Rep. 5 Ch. 534) observed upon. Hooper *v.* Smart. Bailey *v.* Piper - - - - 683

STATUTES:
2 & 3 Anne, c. 4—*Yorkshire Registry* - 350
See Yorkshire Registry Act.
3 & 4 Will. 4, c. 27, s. 34—*Limitations* 290
See Limitations, Statute of. 2.
—— —— s. 25 - - - - 246
See Limitations, Statute of. 1.
3 & 4 Will. 4, c. 42, s. 28—*Amendment of Law*
See Interest on uncertain Sum. [154
5 & 6 Vict. c. 45, s. 26—*Copyright* - 444
See Copyright in Book. 1.
8 Vict. c. 18—*Lands Clauses* - - 658
See Payment out of Court. 2.
—— —— s. 25 - - - - 539
See Submission to Arbitration.
—— —— s. 70 - - - - 278
See Costs under Lands Clauses Act. 1.
—— —— s. 80 - - - - 338
See Costs under Lands Clauses Act. 2.
8 Vict. c. 20, s. 16—*Railway Clauses* - 714
See Compulsory Powers.

STATUTES—*continued.*
11 & 12 Vict. c. 63, ss. 45, 46—*Public Health*
See Pollution of River. [172
17 & 18 Vict. c. 125, s. 17—*Common Law Procedure* - - - - 539
See Submission to Arbitration.
23 & 24 Vict. c. 38, s. 11—*Law of Property* [280
See Investments sanctioned by the Court.
24 & 25 Vict. c. 61, s. 4—*Local Government* 172
See Pollution of River.
25 & 26 Vict. c. 89, s. 35—*Companies* [16, 17, n., 542
See Contract for paid-up Shares. 1, 2, 4.
—— —— ss. 199, 200 - - - 661
See Misrepresentation by Promoters.
27 & 28 Vict. c. 112—*Judgments* - 298
See Judgment Creditor.
30 & 31 Vict. c. 131, s. 25 16, 17, n., 95, 542
See Contract for paid-up Shares. 1—4.
—— —— s. 25 - - - - 670
See Payment for Shares by Money's Worth.
31 & 32 Vict. c. 40, s. 3—*Partition* - 387
See Partition Suit.
31 & 32 Vict. c. 118—*Public Schools Act* 28
See Dismissal of Schoolmaster.
31 & 32 Vict. c. cccxxii.—*Metropolitan District Railway* - - - 368
See Superfluous Lands.
32 & 33 Vict. c. 71, ss. 8, 9, 80—*Bankruptcy*
See Petitioning Creditor. [375
—— —— ss. 16, 40 - - - 705
See Meeting of Creditors. 2.
—— —— s. 19 - - - - 701
See Contempt of Court.
—— —— ss. 28, 80, sub-s. 10, 84, 125 - 705
See Annulling Adjudication.
—— —— s. 126 - - - - 249
See Creditor holding Security.
33 & 34 Vict. c. 35—*Apportionment* - 213
See Apportionment—Tenant for Life and Remainderman.
—— - - - - - - 329
See Apportionment of Dividends.
33 & 34 Vict. c. 75—*Elementary Education* [608
See Transfer of School to School Board

STOCKBROKER—Custom of Stock Exchange 182
See Custom of Stock Exchange.

SUBMISSION TO ARBITRATION — *Consent — Common Law Procedure Act* (17 & 18 *Vict. c.* 125), *s.* 17—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 25.] The reference to arbitration of a question of disputed compensation pursuant to sect. 25 of the *Lands Clauses Consolidation Act*, is a "submission to arbitration by consent" within the meaning of the 17th section of the *Common Law Procedure Act*, and the submission may be made a rule of Court. *Ex parte* Harper - - - - - 539

SUPERFLUOUS LANDS — *Railway Company — Power to let for Terms — Sale — Metropolitan District Railway Act*, 1868.] The *Metropolitan District Railway Act*, 1868, gives the company unrestricted powers of sale over their lands not actually used for the railway. Tomlin *v.* Budd [368

SURPLUS—After gift to keep up tombstones 114
See Honorary Trust.

SUSPENSE PERIOD—Scheme of arrangement of company—Debenture stock - 556
See Scheme of Arrangement.

TAXATION OF COSTS—Joint retainer of solicitors
See Joint Retainer of Solicitors. [680

TENANT IN COMMON—Distress—Separate attornments - - - - 381
See Distress on joint Property.

TENANT FOR LIFE AND REMAINDERMAN—Apportionment—Real estate - 213
See Apportionment—Tenant for Life and Remainderman.
—— Dividends on shares - - - 696
See Dividends, whether Income or Corpus.
—— Enjoyment in specie—Wasting securities
See Enjoyment in Specie. [422
—— Receiver—Right to possession - 490
See Receiver.
—— Waste - - - - - - 306
See Waste.

TENANT IN TAIL—Infant—Sale of real estate by Court—Conversion - - - 192
See Conversion.

THREATENED VIOLATION OF RIGHT - 259
See Bill quia Timet.

THREATENING LEGAL PROCEEDINGS—*Letters Patent—Presumption as to Validity—Plaintiff formerly Licensee of the Patent.*] The Court will restrain a patentee from issuing circulars threatening legal proceedings against infringers unless he will undertake to commence proceedings to assert the validity of his patent; and the fact that the party seeking the aid of the Court was formerly a licensee of the patent under the patentee, and had himself concurred in issuing similar circulars, does not prevent the Court interfering after the expiration of the license. Axmann *v.* Lund [330

TIMBER—Thinnings—Cut timber - - 306
See Waste.

TITLE DEEDS—Delivery up of - - 215
See Purchase for Value without Notice.

TRADE MARK—*Infringement—No Evidence of Deception—Degree of Likeness.*] Bill by traders, praying for a declaration of their right to a certain trade mark, and for an injunction to restrain Defendants from using a brand alleged to be an imitation of it, dismissed with costs, there being no evidence of actual deception, and no such imitation of the Plaintiffs' trade mark as, in the opinion of the Court, made deception probable.—*Seixo* v. *Provezende* (Law Rep. 1 Ch. 192) discussed. Cope *v.* Evans - - - - 138

TRANSFER OF LEASE—Incomplete transfer 11
See Voluntary Gift.

TRANSFER OF SCHOOL TO SCHOOL BOARD—*School Trustees—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75)—*Consent to Alienation—Conditions of Foundation.*] Under section 23 of the *Elementary Education Act*, 1870, managers of elementary schools are empowered to make arrangements for the transfer of schools to school boards formed under the Act, but it is provided that where there is any instrument declaring the trusts of a school, and such instrument contains any provision for the alienation of the school by any persons in any manner or subject to any consent, such an arrangement shall only be made by the persons in the manner and with the consent so provided; and it is also provided that the Education Department of the Privy Council shall consider and have due regard to any objections and representations respecting a proposed transfer which may be made by any person who has contributed to the establishment of such schools.—The 14th section of the Act also provides that no religious catechisms or formulary which is distinctive of any particular denomination shall be taught in any board school:—*Held*, that in the case of a school established by and united with the *National Society*, on the express condition that the children attending it were to be instructed in the Holy Scriptures and in the Liturgy and Catechism of the Church of *England*, the instrument declaring the trusts of the school providing that the school was to be always in union with, and conducted according to the principles of, and in furtherance of the ends and designs of, the *National Society*, but containing no provision whatever for its alienation, the consent of the *National Society* was not required to a transfer of the school to a school board; and that the proper mode for the society to give effect to any objections to a transfer was by appearing before the Education Department. National Society *v.* School Board of London. Attorney-General *v.* English - - - - - 608

TRUST—Breach of—Purchase for value without notice - - - - 215
See Purchase for Value without Notice.

—— Declaration of—Railway stock - 474
See Donatio Mortis Causâ.

—— Declaration of—Voluntary gift - 11
See Voluntary Gift.

—— Express—Statute of limitations—Trust for sale - - - - - 246
See Limitations, Statute of. 1.

—— For payment of debts out of estate—Possession of tenant for life - - 490
See Receiver.

—— Ignorance of—Non-liability of trustee 634
See Liability of Trustee.

—— Precatory—"In full confidence" - 414
See Precatory Trust.

—— To keep up tombstones - - 114
See Honorary Trust.

TRUSTEE—Accounts—Delay in filing bill for account—Costs - - - 356
See Trustee's Accounts.

TRUSTEE—*continued.*

—— Adverse possession by - - - 320
See Limitations, Statute of. 3.

—— Charity—Money paid into Court under Lands Clauses Act - 279, 658
See Payment out of Court. 1, 2.

—— Liability of—Ignorance of trust - 634
See Liability of Trustee.

—— Power to raise portions—Costs - 541
See Portions.

—— Power to retain in specie - - 422
See Enjoyment in Specie.

——Right to indemnity - - - 18
See Liability of Executor.

TRUSTEE'S ACCOUNTS—*Bill for Account—Lapse of Time—Negligence in omitting to keep Accounts—Costs.*] The estate of a testator who died in 1832 was distributed in 1847, as the evidence shewed, at the written request of the persons beneficially entitled. Another part of the estate which fell in in 1852 was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees.—Bill, filed in 1872 by one of the beneficiaries and her husband against the surviving trustee, and the representative of the deceased trustee, for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts and vouchers, without costs. Payne *v.* Evens 356

ULTRÀ VIRES—Rescission of invalid allotment
See Rescission of Allotment. [507

UNPAID RENTS—Mortmain - - 198
See Mortmain. 2.

USER OF BUILDING—Ancient lights - 544
See Light and Air.

UNSOUND MIND—Person of—Dissolution of partnership - - - 265, 268, n.
See Dissolution of Partnership. 1, 2.

—— Person of—Next friend - - 265
See Next Friend.

VENDOR AND PURCHASER—Agent purchasing for his own benefit - - 524
See Agent purchasing for himself.

—— Conditional acceptance of offer - 180
See Conditional Acceptance.

—— Purchase for value without notice - 215
See Purchase for Value without Notice.

—— Specific performance with compensation—Moiety of estate - - - 683
See Specific Performance with Compensation.

—— Statute of Frauds—Vendor not named 1, 4
See Frauds, Statute of. 1, 2.

VESTING OF APPOINTED SHARE—*Instrument creating Power—Period of Vesting—Acquisition of Interest by Appointee—Separate Estate.*] A testator gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, and after her death to pay the fund to the children of the daughter as she should by deed or will appoint, and in default of appointment amongst them equally. The daughter

VESTING OF APPOINTED SHARE—*continued.*
appointed by deed the whole of the fund amongst her children, giving the Plaintiff, who was one of them, a specified sum for her separate use absolutely. The Plaintiff, after the death of her grandfather, and before the date of the appointment by her mother, married a Frenchman domiciled in *France*. He died before the date of the appointment, and there was one child only of the marriage.—There was no settlement on the marriage, and the French law of community applied, under which the child became entitled, in the absence of any contrary declaration by the donor, to half the property acquired by her mother during the marriage:—*Held*, that the Plaintiff must be considered to have acquired the appointed fund from the date of the appointment only, and that the fund not having been acquired during the marriage, did not become subject to the law of community:—*Held*, also, that the fact of the gift being expressed to be for the separate use was a sufficient declaration to exclude the law of community.—*In re Frowd's Settlement* (4 N. R. 54) is overruled by *In re Vizard's Trusts* (Law Rep. 1 Ch. 588). De Serre *v.* Clarke - 587

VOLUNTARY GIFT—*Intended Transfer of Property—Invalid Declaration of Trust.*] *D.*, who was possessed of leasehold premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favour of his grandson *E.*, who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all thereto belonging I give to *E.* from this time forth, with all the stock-in-trade." The lease was then delivered to *E.'s* mother on his behalf:—*Held*, that there was no valid declaration of trust of the property in favour of *E.*—*Richardson* v. *Richardson* (Law Rep. 3 Eq. 686), and *Morgan* v. *Malleson* (Law Rep. 10 Eq. 475) not followed. Richards *v.* Delbridge - - - - - 11

WASTE—*Tenant for Life and Remainderman—Timber—Thinnings—Property in Trees when cut down—Local Custom.* Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timber-like trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings.—Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance.—Where the Court orders timber to be cut down for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste.—A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste; but, *semble*, equity would not allow him to retain the proceeds of wrongful cuttings.—Local custom as to timber observed upon. Honywood *v.* Honywood - - 306

WEST RIDING REGISTRY ACT - - 350
See Yorkshire Registry Act.

WILL—Ademption - - - - 458
See Ademption.

—— Annuity—Charge on corpus - 411, 419
See Annuity charged on Corpus. 1, 2.

—— Annuity—Satisfaction - - - 595
See Election.

—— Before Wills Act - - - 320
See Limitations, Statute of. 3.

—— Charitable bequest—Mortmain 88, 198
See Mortmain. 1, 2.

—— Enjoyment in specie - - - 422
See Enjoyment in Specie.

—— Estate tail—Child *en ventre sa mère*—Intermediate rents - - - 9
See Child en ventre sa mère.

—— Forfeiture of legacy not claimed - 243
See Forfeiture Clause.

—— Honorary trust—Gift of surplus - 114
See Honorary Trust.

—— Hotchpot clause - - - 313
See Hotchpot Clause.

—— Mortmain - - - 88, 198
See Mortmain. 1, 2.

—— Nephews and nieces - - - 504
See "Nephews and Nieces."

—— Precatory trust - - - - 414
See Precatory Trust.

—— Repugnant gift - - - 152
See Repugnant Gift.

—— Release of debt—Appointment of debtor as executor - - - - 315
See Release of Debt.

—— Trust for sale—Statute of Limitations 246
See Limitations, Statute of. 1.

WINDING-UP—Costs of liquidation - 656
See Liquidator.

—— Paid-up shares—Companies Act, 1867, s. 25 16, 17, n., 95, 542
See Contract for paid-up Shares. 1–4.

—— Qualification of director - - 428
See Qualification of Director.

—— Rescission of Allotment - - 507
See Rescission of Allotment.

—— Unregistered company—Misrepresentation [661
See Misrepresentation by Promoters.

WITHDRAWAL FROM OFFICE — Directors of company - - - - 428
See Qualification of Directors.

WITHDRAWAL OF NOTICE — Dissolution of partnership - - - - 265
See Dissolution of Partnership.

WITHDRAWAL OF PROOF — *Composition — Second Meeting—Right of Creditor who has proved to withdraw his Proof—Bankruptcy Rules*, 1870, *r.* 273.] A debtor filed a liquidation petition, and at the first meeting the creditors resolved to accept a composition. At the second meeting a creditor, who had proved his debt at the first meeting, and had voted, but who had since been advised that his proof was not in a proper form, and that it might affect his right to a security which he had,

WITHDRAWAL OF PROOF—*continued.*]
expressed a wish to withdraw the proof and not to vote. No objection was made, and he did not vote. The meeting was adjourned, and at the adjourned meeting the creditors resolved upon a liquidation by arrangement:—*Held*, that Rule 273 applied to the case, and that the creditor was entitled to have his proof taken off the file. *Ex parte* Williams. *In re* Williams - - 373

WITNESS—Non-production of - - - 524
See Non-production of Witness.

WORDS—"Cash under control of the Court" 280
See Investments sanctioned by the Court.

—— "Delineated" - - - - - 714
See Compulsory Powers.

WORDS—*continued.*

—— "In full confidence" - - - 414
See Precatory Trust.

—— "Nephews and nieces" - - 504
See "Nephews and Nieces."

—— "Personal representatives" - - 686
See "Personal Representatives."

YORKSHIRE REGISTRY ACT — *Mortgage—Priority—Registration—2 & 3 Anne, c. 4—Further Charge.*] A memorandum of further charge in favour of the first mortgagee of lands in *Yorkshire* requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge. Credland *v.* Potter - - - - - 350

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

S 2 5 JAN 1983